FILED
JAN 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1143

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellant,

v.

JOHN W. MIKOS, as Property Appraiser of Sarasota County, Florida, and RANDY MILLER, as Executive Director of the Department of Revenue of the State of Florida,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA IN AND FOR THE SECOND DISTRICT

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	3
Constitutional Provisions	3
State Statutes	4
Questions Presented	5
Statement of the Case	6
How the Federal Questions Were Raised Below	10
The Federal Questions are Substantial	11
1. The Due Process Clause	14
2. The Commerce Clause	20
CONCLUSION	23

APPENDIX

Opinion of the District Court of Appeal of the State of Florida in and for the Second District	1a
Opinion of the Circuit Court of the Twelfth Judicial Circuit of Florida in and for Sarasota County	13a
Order of the District Court of Appeal of the State of Florida in and for the Second District	15a
Order of the Supreme Court of Florida	16a
Notices of Appeal to the Supreme Court of the United States	17a
Stipulation for Pre-Trial Order	20a
Tour Schedules—1972-1976	32a
Second Amended Complaint	44a
Excerpts from Brief of Appellee in the District Court of Appeal of the State of Florida in and for the Second District	56a

TABLE OF AUTHORITIES

Cases

	Page
American Refrigerator Transit Co. v. Hall, 174 U.S. 70 (1899)	22
Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment, 347 U.S. 590 (1954)	14, 17, 21
Central Railroad v. Pennsylvania, 370 U.S. 607 (1962)	12, 20, 21
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)	21
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921)	3
Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734 (1978)	20
Gay v. Bessemer Properties, Inc., 159 Fla. 729, 32 So.2d 587 (1947)	11
Greyhound Lines, Inc. v. Board of Equalization, 419 S.W.2d 345 (Tex. 1967)	18
Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123 (1931)	14, 15
Hemingway Transport, Inc. v. Tax Assessor, 105 R.I. 411, 252 A.2d 340 (1969)	16, 18
Ice Capades, Inc. v. County of Los Angeles, 56 Cal. App. 3d 745, 128 Cal. Rptr. 717 (1976)	13, 19
Japan Line, Ltd. v. County of Los Angeles, 99 S. Ct. 1813 (1979)	3, 13, 19
Johnson Oil Refining Co. v. Oklahoma ex rel. Mitchell, 290 U.S. 158 (1933)	12, 14, 16, 17, 18, 20, 21
Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978)	20
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)	3
Norfolk & Western Railway v. Missouri State Tax Commission, 390 U.S. 317 (1968)	12, 14, 15, 20
Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949)	12, 14, 15, 20, 21

	Page
Reeves v. Island Creek Fuel & Transportation Co., 313 Ky. 400, 230 S.W.2d 924 (Ky. Ct. App.), *cert. denied*, 340 U.S. 853 (1950)	17, 18
Sea-Land Service, Inc. v. County of Alameda, 12 Cal. 3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974)	17
Smoot Sand & Gravel Corp. v. District of Columbia, 174 F.2d 505 (D.C. Cir.), *cert. denied*, 337 U.S. 939 (1949)	16, 17, 18
Standard Oil Co. v. Peck, 342 U.S. 382 (1952)	12
Union Tank Line Co. v. Wright, 249 U.S. 275 (1919)	14
Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940)	14, 15

Constitutional Provisions

Constitution of the United States:	
Article I, Section 8, Clause 3	*passim*
Fourteenth Amendment, Section 1	*passim*

Statutes

United States Code:	
Title 28, Section 1257(2)	3
Title 28, Section 2103	3
Florida Statutes:	
Section 192.001(2)(1977)	8
Section 192.011(1977)	4 & *passim*
Section 192.032(2)(1977)	4 & *passim*
Section 193.085(4)(1977)	9

Rules

United States Supreme Court Rule 48(3)	2

Other Authorities

P. Hartman, *State Taxation of Interstate Commerce* (1953)	21

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Appellant,

v.

JOHN W. MIKOS, as Property Appraiser of Sarasota County, Florida, and RANDY MILLER, as Executive Director of the Department of Revenue of the State of Florida,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
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THE SECOND DISTRICT

JURISDICTIONAL STATEMENT

Appellant, Ringling Bros.-Barnum & Bailey Combined Shows, Inc. ("Ringling Bros."), appeals from the final order of the District Court of Appeal of the State of Florida in and for the Second District ("Florida Court of Appeal"), rendered March 21, 1979, upholding the constitutionality of Sections

192.011 and 192.032(2) of the Florida Statutes, as applied by Appellees ("Florida Tax Officials"). The Florida Tax Officials applied these statutes to permit a nondomiciliary jurisdiction (Sarasota County, Florida) to impose an unapportioned *ad valorem* personal property tax on the full value of Ringling Bros.' railroad cars, animals and operating equipment used exclusively in the transportation and presentation of Ringling Bros.' traveling circus in interstate and foreign commerce, though that property is present in Florida for only a small fraction of each year. The Florida Court of Appeal reversed the order of the Circuit Court of the Twelfth Judicial Circuit of Florida in and for Sarasota County ("Florida Circuit Court"), which had held, after trial, that these statutes could constitutionally be applied only by apportioning the tax according to the amount of time the properties were present in Sarasota County, Florida, during each tax year in question—1972 through 1976.

Ringling Bros. submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented requiring plenary consideration, with briefs on the merits and oral argument for their resolution.

OPINIONS BELOW

The opinion of the Florida Court of Appeal is reported at 368 So. 2d 884 (1979),[1] and is reprinted in the appendix hereto, p.1a, *infra* (hereinafter cited as A.).

The opinion of the Florida Circuit Court, dated April 25, 1977, is not reported. It is reprinted in the appendix hereto (A.13a).

[1] The caption in the Florida Court of Appeal included Harry L. Coe, Jr., as Executive Director of the Department of Revenue of the State of Florida. He has been succeeded by Randy Miller, whose name has been substituted in the caption. *See* U.S. Sup. Ct. Rule 48(3). In addition, the Board of Tax Adjustment and the Tax Collector of Sarasota County were dropped as parties to the action pursuant to stipulation between the parties.

JURISDICTION

The order of the Florida Court of Appeal was filed on January 19, 1979. A motion for rehearing was denied by that court on March 21, 1979 (A.15a). Ringling Bros. duly appealed to the Supreme Court of Florida and on October 26, 1979, that court dismissed the appeal, denied certiorari to review the decision of the Florida Court of Appeal and refused to entertain a motion for rehearing (A.16a).

A notice of appeal to the United States Supreme Court was served on January 10, 1980, and filed in the Florida Supreme Court on January 14, 1980 (A.17a), in the Florida Court of Appeal on January 15, 1980 (A.18a), and in the Florida Circuit Court on January 17, 1980 (A.19a). This appeal is being docketed within 90 days from the dismissal of the appeal and denial of certiorari by the Supreme Court of Florida.

The jurisdiction of the Supreme Court of the United States to review the Florida Court of Appeal's decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2), and is sustained by the following decisions: *Japan Line, Ltd. v. County of Los Angeles,* 99 S. Ct. 1813 (1979); *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63 (1928); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921).

If this Court does not consider appeal to be the proper method of review, Ringling Bros. requests that this Jurisdictional Statement be acted upon as a petition for a writ of certiorari pursuant to Title 28, United States Code, Section 2103.

CONSTITUTIONAL PROVISIONS

The relevant provisions of the United States Constitution include: Article I, Section 8, Clause 3, the Commerce Clause; and Amendment Fourteen, Section 1, the Due Process Clause.

STATE STATUTES

Florida Statutes, Section 192.011, at 812 (1977):

> All property to be assessed. The property appraiser shall assess all property located within his county, whether such property is taxable, wholly or partially exempt, or subject to classification reflecting a value less than its just value at its present highest and best use. Extension on the tax rolls shall be made according to regulation promulgated by the department in order properly to reflect the general law. Streets, roads and highways which have been dedicated to or otherwise acquired by a municipality, a county, or a state agency may be assessed, but need not be.

Florida Statutes, Section 192.032(2), at 812 (1977):

> Situs of property for assessment purposes. All property shall be assessed according to its situs as follows:
>
> * * * *
>
> (2) Tangible personal property, in that county and municipality in which it is permanently located on January 1 of each year. Property brought into the state after January 1 and before April 1 of any year shall be considered to have been in the state on January 1 of that year; except that tangible personal property brought into the state after January 1 and before April 1 of any year shall be taxable for that year only if the property appraiser has reason to believe that such property will be removed from the state prior to January 1 of the next succeeding year. All tangible personal property which is removed from one county in this state to another county after January 1 of any year shall be subject to taxation for said year in the county where located on January 1; except that the provisions of this paragraph shall not apply to tangible personal property located in such county on January 1 on a temporary or transitory basis if such property is included in the tax return being filed in the county in this state where such tangible personal property is permanently located.

QUESTIONS PRESENTED

1. Whether Sections 192.011 and 192.032(2) of the Florida Statutes, as applied by Florida Tax Officials to impose an unapportioned *ad valorem* personal property tax on personal property including railroad cars, operating equipment and animals used by a nondomiciliary traveling circus exclusively in transporting and presenting entertainment in interstate and foreign commerce, violate the Due Process Clause of the Fourteenth Amendment or the Commerce Clause, Article I Section 8, Clause 3, of the Constitution of the United States, when that property is present within Sarasota County, Florida, the taxing jurisdiction, for an average of less than sixty days during each tax year.

2. Whether railroad cars owned and used by a taxpayer exclusively to transport its own property in interstate and foreign commerce are instrumentalities of commerce, rather than commodities, for the purpose of determining the validity of the application of Florida's *ad valorem* personal property tax statutes under the Due Process and Commerce Clauses of the United States Constitution.

3. Whether circus animals and operating equipment such as mobile cages, wagons, tractors, rigging, nets and tents used year after year by a traveling circus in transporting and loading and unloading its circus trains and in the presentation of its show throughout the United States and Canada should be treated as instrumentalities of commerce, rather than as commodities, for the purpose of determining the validity of the application of Florida's *ad valorem* personal property tax statutes under the Due Process and Commerce Clauses of the United States Constitution.

STATEMENT OF THE CASE

A. Relevant Facts of Ringling Bros.' Properties and Operations

Ringling Bros. is a Delaware corporation and at all relevant times has had its principal place of business in Washington, D.C., where its corporate offices are located and all its executive and administrative functions are performed.[2] Ringling Bros. produces and stages circus performances throughout the United States and Canada. It produces two comparable but separate shows called the "Red Unit" and the "Blue Unit," each of which has its own operating equipment and animals ("Tour Property"). The operating equipment, which is specially designed, is built to be carried on railroad cars in connection with the tour of each unit throughout the United States and Canada. This equipment, in addition to mobile cages for the animals, includes specially designed wagons into which apparatus is fitted, small tractors used for hauling the wagons and cages from railroad sidings to the place of exhibition and back, rigging necessary for aerial and acrobatic acts, nets, tents and other similar equipment, all designed to meet the special logistical needs of Ringling Bros.' circus and to make possible the setting up and tearing down of the circus at each engagement.

The Tour Property and other circus property as well as the circus performers are transported throughout the United States and Canada in Ringling Bros.' railroad box cars, passenger cars and flat cars ("Railroad Property"). Two trains totalling approximately sixty-eight railroad cars are used to transport these units. These railroad cars are owned by Ringling Bros. and are moved from location to location by locomotives and cabooses of interstate common carriers hired by Ringling Bros. pursuant to agreement. Circus personnel also use these railroad cars as living quarters wherever the circus is.

[2] The facts as enumerated herein are based on those stipulated to by the parties in the Stipulation for Pre-Trial Order (A.20a).

Each circus performance consists of approximately forty to fifty specialty acts and five large production numbers in which most of the entire cast participates. A new production, based on a particular theme, is conceived and executed each year for one of the units, one year for the Red Unit and the next year for the Blue, and each new show tours for two years before it is changed.

The creation and two-year life of each unit's show is summarized as follows: During March of each year, while both units are touring, the coming year's new show is created and planned at Ringling Bros.' headquarters in Washington, D.C. The costumes and most of the props[3] and other equipment are manufactured and assembled in New York City during a period from June to November or December when they are shipped to facilities leased by Ringling Bros. in Venice, Sarasota County, Florida. In December, the production numbers of the new show are rehearsed in Venice and in early January the new show begins its two year tour. The new show opens in Venice and proceeds from there to other points in Florida and throughout the United States and Canada—always traveling in its own railroad cars. The circus performs exclusively in indoor arenas and auditoriums and arranges for the use of these sites as many as five to ten years in advance of each season so that each show has a pre-established two-year itinerary.

In early December of the new show's first year, it arrives again in Venice where costumes and props which have been refurbished in New York are fitted and adjusted. At the beginning of February, the show (the theme of which is unchanged) continues on its pre-planned interstate tour and travels until approximately mid-November. The unit then begins a new two-year cycle as "the new show." *See* Tour Schedules-1972-1976 (A.32a).

During the tax years in question—1972 through 1976—Ringling Bros. had approximately 650 employees. Each

[3] The validity of the tax imposed upon the costumes and props, which are leased by Ringling Bros., is not under consideration in this action.

unit had approximately 280 persons traveling with it. Eighty-five employees, including all of Ringling Bros.' executive officers, were based in Washington, D.C. and resided in that area. Eleven employees, principally security, custodial and maintenance personnel, were based in Venice. During the tax years in question, the Railroad and Tour Properties of the Red Unit were physically present each year in Sarasota County, Florida, a minimum of thirty-two days (in 1973) and a maximum of eighty-three days (in 1974), and the Railroad and Tour Properties of the Blue Unit were present there a minimum of twenty-eight days (in 1976) and a maximum of seventy-nine days (in 1975).[4]

The maximum number of performances throughout the United States and Canada given by either unit in any of the years in litigation was 1,023. The maximum number of performances given in the State of Florida was sixty-eight and in Sarasota County only twelve. Performances given in Sarasota County never exceeded 1.56% of the total year's performances. During the relevant period, Ringling Bros. presented more performances each year in several states, including New York and California, than were presented in Florida.

The percentage of Ringling Bros.' total gross receipts attributable to Florida performances was, at the maximum, 5.5%. The percentage of gross receipts from Sarasota County performances never exceeded 1%.

B. Relevant Florida Proceedings

Section 192.011 of the Florida Statutes requires the county property appraiser to assess at fair market value[5] all property located within his jurisdiction. Section 192.032(2) of the

[4] By comparison, during every year in dispute, a circus unit was physically present in New York City for at least sixty days and as many as sixty-two days, in California for at least fifty-four days and as many as sixty-one days, and in Washington, D.C. for at least eighteen days and as many as twenty-seven days. *See* Tour Schedules-1972-1976 (A.32a).

[5] The "fair market value" standard is provided in Section 192.001(2) of the Florida Statutes (1977).

Florida Statutes provides that tangible personal property has a tax situs for assessment purposes if the property is "permanently located" in the taxing county on the assessment date, January 1 of each year. For the years 1972 through 1976, Appellee John W. Mikos, as Property Appraiser of Sarasota County, assessed the full value of all Ringling Bros.' Railroad and Tour Properties. With the exception of the 1975 and 1976 assessments of the Railroad Property, Appellee Mikos' assessments were sustained by the Sarasota County Board of Tax Adjustment.[6]

After exhausting its administrative remedies, Ringling Bros. filed suit in the Florida Circuit Court for each of the tax years 1972 through 1976 claiming that its Railroad and Tour Properties, present in Sarasota County, Florida for periods each year ranging from twenty-eight days to a maximum of eighty-three days, could not constitutionally be taxed based on their full, unapportioned value.[7] The separate yearly claims were consolidated in a single action and the suit was tried on November 18 through 20, 1976.

[6] The 1975 and 1976 assessments of the Railroad Property at full value were disapproved by the Sarasota County Board of Tax Adjustment because the Florida State Department of Revenue had centrally assessed the Railroad Property as "private car line" property for those years. Section 193.085(4) of the Florida Statutes requires special assessment of "private car line" property at a proportion of its full value determined by "the *average* number of. . . cars which are *habitually present* within Florida." Fla. Stat. §193.085(4)(b)(1977) (emphasis added).

The assessments of Ringling Bros.' Railroad Property for the tax years 1975 and 1976 were not challenged in the proceedings below and are not included in this appeal. Appellee Mikos, in a separate action, however, is currently contesting the "private car line" ruling of the Florida State Department of Revenue and claiming that the Railroad Property should have been assessed at full value for the years 1975 and 1976. Thus, the constitutional questions arising as to Ringling Bros.' Railroad Property for the years 1975 and 1976 are not moot.

[7] Ringling Bros. keeps certain animals and equipment in Venice, Florida on a permanent basis. The tax on the full value of that property has always been paid without question by Ringling Bros.

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

From the inception of this action Ringling Bros. has continuously challenged the constitutionality of Sections 192.011 and 192.032(2) of the Florida Statutes. In each complaint, Ringling Bros. asserted that these statutes could not be applied to tax its property on an unapportioned basis without offending the Due Process and Commerce Clauses of the Constitution of the United States. In its 1972 Second Amended Complaint (A.44a), for example, Ringling Bros. alleged:

> 26. Assuming the provisions of Sections 192.011 and 192.032(2) of the Florida Statutes required the Defendant Mikos to assess the Equipment[8] physically located in Sarasota County and the State of Florida on the assessment date, at 100% of its assessed value, such Statutes are void and unconstitutional as applied to the Equipment herein under the interstate [*sic*] and due process clauses of Article I, Section 8 and Section 1 of Amendment XIV of the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida.[9] (A.51a).

After trial, the Florida Circuit Court upheld Ringling Bros.' position. It decided the Railroad and Tour Properties were:

> subject to tangible personal property taxes by Sarasota County, Florida, but under the Constitution of the United States the tax must be an apportioned tax determined by multiplying the assessed value . . . by a fraction, the numerator of which is the number of days the . . . property was physically present in Sarasota County during the year, and the denominator of which is the total number of days in the year . . . . (A.13a-14a).

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[8] Ringling Bros. used the comprehensive term "Equipment" to define both its Railroad and Tour Properties. Second Amended Complaint ¶ 12 (A.47a).

[9] Similar allegations were contained in every complaint filed by Ringling Bros. for the tax years in dispute.

On appeal by the Florida Tax Officials to the Florida Court of Appeal, Ringling Bros. reiterated its constitutional attack on the application of Sections 192.011 and 192.032(2). Ringling Bros. stated, among other things, in its brief to the Florida Court of Appeal:

> Thus, while the state of domicile may tax a taxpayer's tangible personal property at full value when no tax situs has been established for the property outside of the domicile, where movable personal property acquires a situs sufficient to satisfy constitutional requirements for taxation in a nondomiciliary state, the nondomiciliary jurisdiction [Florida[10]] may not tax the movable property at full value. It may only tax on a fair, apportioned basis. (A.57a).

In reversing the decision of the Florida Circuit Court, the Florida Court of Appeal determined that Ringling Bros.' Railroad and Tour Properties were treatable as commodities which had "come to rest" in Florida, rather than as instrumentalities of commerce, and should be taxed at their full value. Holding that unapportioned taxation was constitutionally valid, the court stated:

> A taxing authority may choose to apportion its tax to reflect a direct relation between the tax paid and benefits enjoyed. . . . This would avoid the burden of double taxation where an actual situs has been established in more than one jurisdiction. A state is not, however, obliged to avoid double taxation in this circumstance, even though such a result is favored when interpreting tax statutes. (A.11a n.7) (citations omitted).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Sarasota County, Florida has taxed the full value of Ringling Bros.' Railroad and Tour Properties even though Ringling Bros. is not a domiciliary of Florida and the properties at issue are present in Sarasota County for only a small fraction

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[10] Florida accepts the generally held view that the state of incorporation, in this case Delaware, is the state of domicile. *See* Gay v. Bessemer Properties, Inc., 159 Fla.729, 32 So. 2d 587 (1947).

of each year. In addition to its situs in Delaware, its state of domicile, Ringling Bros.' circus has a tax situs in many other jurisdictions through which it regularly travels and performs. In view of the nature of the property involved—railroad cars and other property used in the interstate transportation and presentation of circus entertainment—imposition of the tax at full value raises substantial constitutional questions under the Due Process and Commerce Clauses of the United States Constitution.

In approving taxation of instrumentalities of interstate commerce without apportionment, the decision of Florida's Court of Appeal departed completely from constitutional principles carefully built by this Court under both the Due Process and Commerce Clauses in such cases as: *Johnson Oil Refining Co. v. Oklahoma ex rel. Mitchell,* 290 U.S. 158 (1933) (nondomiciliary state may tax instrumentalities of commerce—railroad tank cars—only on an apportioned basis based on their average presence in the state); *Ott v. Mississippi Valley Barge Line Co.,* 336 U.S. 169 (1949) (nondomiciliary state may tax instrumentalities of commerce—barges and towboats—only on an apportioned basis); *Standard Oil Co. v. Peck,* 342 U.S. 382 (1952) (domiciliary state may tax instrumentalities of commerce—boats and barges—at full value only if they do not have a situs in another jurisdiction); *Central Railroad v. Pennsylvania,* 370 U.S. 607 (1962) (domiciliary state may not tax full value of instrumentalities of commerce—railroad cars—if other tax situses are established); *Norfolk & Western Railway v. Missouri State Tax Commission,* 390 U.S. 317 (1968) (nondomiciliary state may not levy a tax on instrumentalities of commerce—railroad cars—which is grossly disproportionate to property's contact with state). These cases all were reviewed pursuant to this Court's appeal jurisdiction.

These cases establish that (1) instrumentalities of interstate commerce are subject to state *ad valorem* property taxes at full value by the state of a taxpayer's domicile unless the property has acquired a tax situs, based on habitual employment, in another state, in which case apportionment is required, and (2) nondomiciliary states in which the property has acquired a tax situs may tax only their proportionate share of the property based on its average or habitual presence in that state.

If it is not reversed by this Court, the decision of the Florida Court of Appeal will represent the only instance of a state's direct violation of these constitutional restraints as applied to instrumentalities of commerce such as the railroad cars involved herein. The decision threatens the uniform and nondiscriminatory treatment of other interstate commercial enterprises by encouraging improper and disproportionate taxation by taxing authorities competing for the same tax dollars.

With respect to Ringling Bros.' Tour Property, the decision under appeal rejects the recent contrary decision of an appellate court in California in a case dealing with similar traveling show equipment and thereby poses a conflict in the application of federal constitutional principles by various state courts.[11]

This Court very recently reaffirmed its responsibility to protect commerce from arbitrary exactions by the separate states. In *Japan Line, Ltd. v. County of Los Angeles,* 99 S.Ct. 1813, 1824 (1979), which concerned state taxation of instrumentalities of foreign commerce, this Court stated:

> In interstate commerce, if the domiciliary State is "to blame" for exacting an excessive tax, this Court is able to insist upon rationalization of the apportionment.

Here, a nondomiciliary state is placing an excessive burden on an interstate enterprise in contravention of both the Due Process and Commerce Clauses.

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[11] Ice Capades, Inc. v. County of Los Angeles, 56 Cal. App. 3d 745, 128 Cal. Rptr. 717 (1976), treated similar traveling show property as instrumentalities of commerce requiring apportionment. *See* discussion at p. 19, *infra.* Although Ringling Bros.' Railroad and Tour Properties may be peculiar to its circus, similar property, such as scenery, costumes, props, musical instruments and sports equipment used in interstate commerce by traveling shows, concerts, ballet and theater companies and sports teams would be subjected to unapportioned and therefore duplicative taxation in states adopting the Florida Court of Appeal's reasoning.

1. The Due Process Clause

In assessing constitutionality of state taxation of tangible movable property, the primary inquiry under the Due Process Clause is whether the property has acquired a tax situs within the state sufficient to support the degree of taxation exacted. *See, e.g., Norfolk & Western Railway v. Missouri State Tax Commission,* 390 U.S 317, 323-327 (1968); *Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment,* 347 U.S. 590, 600-601 (1954); *Johnson Oil Refining Co. v. Oklahoma ex rel. Mitchell,* 290 U.S. 158, 162-163 (1933). The Florida Court of Appeal applied the statutes at issue in violation of the Due Process Clause by authorizing an exaction from Ringling Bros. which is grossly disproportionate to the opportunities and benefits provided by Florida to the properties.[12] *See, e.g., Norfolk & Western Railway v. Missouri State Commission, supra,* 390 U.S. at 326; *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell,* 283 U.S. 123, 135 (1931); *Union Tank Line Co. v. Wright,* 249 U.S. 275, 282-283 (1919).

In deciding that the Railroad and Tour Properties need not be taxed on a fair, apportioned basis, the Florida Court of Appeal cited *Ott v. Mississippi Valley Barge Line Co.,* 336 U.S. 169 (1949), and *Wisconsin v. J.C. Penney Co.,* 311 U.S. 435 (1940), and stated:

> The Due Process Clause does not require that in all circumstances there be a *quid pro quo* between the tax paid and the benefits received. The statement by the United States Supreme Court that when a state has the power to levy a tax on property it must do so in "relation to opportunities, benefits, or protection conferred or afforded by the taxing State" is to remind the states that the property it seeks to tax must have a sufficient relationship to their jurisdictional boundaries. (A.11a) (citations and footnote omitted).

[12] The error of the Florida Court of Appeal is brought clearly into focus when the nexus of Ringling Bros.' Railroad and Tour Properties with the taxing jurisdiction is considered for each discrete tax year. In 1972, for example, the Blue Unit and its Railroad and Tour Properties were present in Sarasota County for only thirty-four days, yet the Florida Court of Appeal held they were subject to full taxation. In 1972 the same Blue Unit was present in New York City for sixty-two days and in California for fifty-four days. In 1973, the Red Unit and its Railroad and Tour Properties were present in Sarasota County for only thirty-two days, and again the Florida Court of Appeal authorized taxation of these properties in full. During that year, the Red Unit was present in New York City for sixty-two days and in California for fifty-four days. *See* Tour Schedules—1972-1976(A.23a).

In fact, this Court in both *Ott* and *J.C. Penney* approved only an apportioned tax and reiterated the Due Process requirement of a rational relationship between the magnitude of the tax imposed and the contact of the property with the state. In *Ott,* this Court approved Louisiana's tax on barges and towboats levied on the basis of actual distance traveled within Louisiana, and in *J.C. Penney,* Wisconsin was permitted to tax income attributable only to activities in Wisconsin. *Ott* and *J.C. Penney* do not support Florida's imposition of a tax grossly disproportionate to the benefits and opportunities it provides. *See Norfolk & Western Railway v. Missouri State Tax Commission, supra,* 390 U.S. at 326-327, in which the assessment for tax purposes of railroad cars far exceeded the value of the cars actually present within the state (8.3% assessed when only 2.7% of the cars were present) and was held to violate the Due Process Clause, and *Hans Rees' Sons Inc. v. North Carolina ex rel. Maxwell, supra,* 283 U.S. at 127-128, 135-136, in which North Carolina's formula for apportioning a corporate income tax was stricken under the Due Process Clause because it resulted in taxing between 66% and 85% of a corporation's income when in fact only 17% of its income could be attributed to activity in the state.

A. *The Railroad Property*

Ringling Bros.' railroad cars are the exclusive means by which its circus is transported, according to a pre-planned itinerary of appearances, from one jurisdiction to another. Nevertheless, the Florida Court of Appeal treated Ringling Bros.' railroad cars as commodities which, unlike instrumentalities, could be taxed at full value wherever they came to rest. This is the first time railroad cars employed in interstate commerce have been treated as commodities. This is also the

first time a nondomiciliary state has been permitted to tax the full value of such instrumentalities of commerce in contravention of *Johnson Oil Refining Co. v. Oklahoma ex rel. Mitchell,* 290 U.S. 158 (1933).[13]

The decision of the Florida Court of Appeal is in direct conflict with this Court's decision in *Johnson Oil.* In that case, the State of Oklahoma imposed a tangible property tax upon a nondomiciliary taxpayer's entire fleet of 380 railroad tank cars. The taxpayer was an Illinois corporation with its principal office in Chicago, but its only refinery was in Oklahoma. The tank cars were owned by the taxpayer and used to transport its own products from its refinery in Oklahoma to points throughout the United States. Unless diverted by special orders, the empty tank cars were always returned to the Oklahoma refinery after deliveries were made. The cars were marked: "Johnson Oil Refining Company, Cleveland, Oklahoma" or "When empty return to Johnson Oil Refining Company, Cleveland, Oklahoma." The taxpayer maintained repair trackage at its Oklahoma refinery which was the only location where car repairs and replacements were accomplished. Throughout the year, a daily average of approximately sixty-four of the taxpayer's entire fleet of 380 tank cars was present in Oklahoma. Stated another way, each car in the fleet was present in Oklahoma for an average of approximately 17%, or sixty-two days, of the year. The Supreme Court of Oklahoma approved a tax on the full value of all 380 cars. In reversing, Chief Justice Hughes,

[13] In the few instances since *Johnson Oil* in which nondomiciliary states have attempted to impose unapportioned property taxes in similar circumstances, full taxation has not been permitted. *See* Smoot Sand & Gravel Corp. v. District of Columbia, 174 F.2d 505, 506 (D.C. Cir.) (Prettyman, J.), *cert. denied,* 337 U.S. 939, (1949) ("If tangible property moves in interstate commerce and is in one state part of the time and in other states (none being the state of domicile) part of the time, it cannot be constitutionally taxed at full value in any one of those states"); Hemingway Transp., Inc. v. Tax Assessor, 105 R.I. 411, 252 A.2d 340 (1969) (nondomiciliary state could constitutionally levy only an apportioned tax on fleet of motor vehicles used to haul merchandise in interstate commerce though no tax was paid in other jurisdictions and the taxpayer garaged, serviced and loaded the vehicles at its terminal facility in Rhode Island).

writing for a unanimous Court, held that Oklahoma, in taxing the entire fleet as if all cars were present there for the entire year, had exceeded its jurisdictional basis under the Due Process Clause. In his opinion, the Chief Justice stated:

> When a fleet of cars is habitually employed in several States . . . it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in other States. . . .
>
> * * * *
>
> Applying these principles, no ground appears for the taxation of all the cars of the appellant in Oklahoma. It is true that the cars went out from and returned to Oklahoma, being loaded and reloaded at the refinery, but they also entered and were employed in other States where the oil was delivered. Oklahoma was entitled to tax its proper share of the property employed in the course of business which these records disclose, and this amount could be determined by taking the number of cars which on the average were found to be physically present within the State.

290 U.S. at 162-163.

Florida's treatment of Ringling Bros.' properties—particularly its railroad cars—cannot be reconciled with *Johnson Oil.* Like the taxpayer in *Johnson Oil,* Ringling Bros. uses its own railroad cars to transport its own property in interstate commerce. The railroad cars may go out from Florida and return there but the cars are habitually employed in many jurisdictions throughout each tax year. *Johnson Oil* mandates that no one jurisdiction may tax the entire fleet.[14]

[14] The rule of *Johnson Oil* has been applied to movable property in a number of subsequent decisions by this Court and other federal and state courts. *See, e.g.,* Braniff Airways, Inc. v. Nebraska State Bd. Equalization & Assessment, 347 U.S. 590 (1954)(airplanes); Smoot Sand & Gravel Corp. v. District of Columbia, 174 F.2d 505 (D.C. Cir.), *cert. denied,* 337 U.S. 939 (1949)(tugs, scows and launches); Sea-Land Serv., Inc. v. County of Alameda, 12 Cal. 3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974)(containers); Reeves v. Island Creek Fuel & Transp. Co., 313 Ky. 400, 230 S.W. 2d 924 (Ky. Ct. App.),

The Florida Court of Appeal found *Johnson Oil* inapplicable to Ringling Bros.' Railroad Property, stating:

> However, we do not view Ringling's railroad property as an instrumentality in the same sense as the cars involved in the cases referred to above [including *Johnson Oil*]. Ringling simply used its railroad property *to haul its own show* from place to place. . . . (A.10a n.5) (emphasis added).

The Florida Court of Appeal clearly erred in attempting to distinguish the Railroad Property on this basis, since the tank cars in *Johnson Oil* were also used to transport the taxpayer's own property. *See Smoot Sand & Gravel Corp. v. District of Columbia,* 174 F.2d 505 (D.C. Cir.), *cert. denied,* 337 U.S. 939 (1949) (tugs and scows owned by Smoot and used exclusively to haul its own sand and gravel received apportioned tax treatment); *Reeves v. Island Creek Fuel & Transportation Co.,* 313 Ky. 400, 230 S.W.2d 924 (Ky. Ct. App.), *cert. denied,* 340 U.S. 853 (1950) (barges and towboats used to transport only parent company's coal could be taxed only on an apportioned basis).

The decision of the Florida Court of Appeal threatens the equitable and uniform treatment of instrumentalities of commerce prescribed by this Court and creates a significant burden of multiple taxation upon such instrumentalities.

B. *The Tour Property*

The Florida Court of Appeal also treated Ringling Bros.' Tour Property as commodities. This property includes Ringling's cages which are carried on its flat cars and used to transport its animals in interstate commerce. The Tour Property also includes wagons and dollies on which equipment is moved from the railroad cars to the various show sites, small tractors used to haul the wagons, rigging for acrobatic and aerial acts, nets and other equipment necessary in the presentation of the circus. This property is never dealt in, sold or

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cert. denied, 340 U.S. 858 (1950) (towboats and barges); Hemingway Transp., Inc. v. Tax Assessor, 105 R.I. 411, 252 A.2d 340 (1969) (motor vehicles); Greyhound Lines, Inc. v. Board of Equalization, 419 S.W. 2d 345 (Tex. 1967) (buses).

transferred to others or consumed in the course of Ringling Bros.' business, but is used and re-used by the circus as the means of transporting and presenting entertainment from Quebec City, Canada, to Monroe, Louisiana, and from Providence, Rhode Island, to Spokane, Washington. Ringling Bros.' animal cages, for example, function in a role similar to that of containers on a ship. *Cf. Japan Line, Ltd. v. County of Los Angeles,* 99 S. Ct. 1813 (1979). Ringling Bros.' Tour Property is an instrumentality by which its business is conducted in interstate commerce and should have been treated as such.

Apportionment was held constitutionally mandated with respect to similar property by a unanimous California appellate court in *Ice Capades, Inc. v. County of Los Angeles,* 56 Cal. App. 3d 745, 128 Cal. Rptr. 717 (1976). There, the Ice Capades traveling ice show challenged the validity of full value tax assessments made by Los Angeles County, which Ice Capades conceded to be its domicile, against movable property including costumes, props and equipment used in its show.

The California District Court of Appeal found that Ice Capades also had a tax situs in New Jersey and that Los Angeles County, even as the domicile of the taxpayer, did not have the power to tax its property except on an apportioned basis. In so holding, the court found that the mandatory protection of apportionment was not limited to traditional instrumentalities of commerce, *i.e.,* railroad cars, trucks and the like, but must be applied as well to costumes, props and operating equipment used by a traveling show in interstate commerce. Ringling Bros.' Tour Property, which is used year after year, is even closer to being a true instrumentality than the costumes and props at issue in *Ice Capades* which are used for only a season.

The required tax treatment of property such as Ringling Bros.' Tour Property, which is an integral part of the movement of its circus in interstate commerce, has never been decided by this Court and a conflict exists between the appellate courts of California and Florida concerning the constitutional limits of

state taxation of such property. Similar property is used by a substantial number of interstate businesses involved in transporting and presenting various traveling entertainments—ice shows, circuses, opera and ballet companies on tour, concert musicians on tour, traveling theater stock companies, carnivals, rodeos, baseball, football, basketball, hockey, soccer and tennis teams. The Florida Court of Appeal's decision subjects the "tools of the trade" of these traveling entertainment businesses to full multiple taxation.

2. The Commerce Clause

The Commerce Clause of the United States Constitution protects against taxes which impose undue burdens on or unfairly discriminate against property engaged in interstate commerce. *E.g., Norfolk & Western Railway v. Missouri State Tax Commission,* 390 U.S. 317 (1968); *Central Railroad v. Pennsylvania,* 370 U.S. 607 (1962). The Commerce Clause is offended when one state taxes more than its fair share of property in interstate commerce and thereby subjects interstate commerce to potential multiple taxation.[15] *E.g., Central Railroad v. Pennsylvania, supra.*

[15] This Court has shown its willingness to shield interstate commerce from the risk alone of a multiple tax burden. *See, e.g.,* Central R.R. v. Pennsylvania, 370 U.S. 607, 614 (1962); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174 (1949); Johnson Oil Ref. Co. v. Oklahoma *ex rel.* Mitchell, 290 U.S. 158, 162 (1933). Recently, this Court required demonstration of actual duplicative taxation prior to affording Commerce Clause protection, but only in cases involving an already apportioned tax where the taxpayer challenged as unfair one state's efforts at apportionment which conflicted with another state's apportionment scheme. *See* Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) (failure to establish that Iowa and Illinois were in fact taxing the same sales); Department of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 746 (1978) ("errors of apportionment that may lead to multiple burdens may be corrected when they occur").

Although the Constitution does not prohibit some overlap due to variant apportionment formulas, an event which is inevitable absent uniform national rules, grossly disproportionate duplication will not be countenanced. Moorman Mfg. Co. v. Bair, *supra,* 437 U.S. at 274.

As noted in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977), the Commerce Clause demands that a:

> tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

The requirements under the Commerce Clause are closely interwined with Due Process considerations. *See* P. Hartman, *State Taxation of Interstate Commerce* 13-20 (1953). In *Central Railroad v. Pennsylvania,* 370 U.S. 607 (1962), for example, this Court struck down under both the Commerce and Due Process Clauses an *ad valorem* personal property tax levied by Pennsylvania on the full value of a domiciliary taxpayer's freight cars that had a tax situs in another jurisdiction. By subjecting that property to the risk of double taxation, the Pennsylvania statute, as applied, was held to violate both the Due Process and Commerce Clauses of the United States Constitution.

Ringling Bros. is domiciled in Delaware and headquartered in Washington, D.C. Its circus and properties are present in New York and California approximately two months each year. In addition, since the circus travels over fixed routes on regular schedules and its properties are habitually employed in many jurisdictions, they may arguably have acquired a tax situs in many of the states through which the circus passes and in which it performs. *See, e.g., Central Railroad v. Pennsylvania, supra,* 370 U.S. at 613-614 (1962) (railroad cars operating on fixed routes and regular schedules in nondomiciliary state acquired tax situs there); *Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment,* 347 U.S. 590, 600-601 (1954) (habitual employment established tax situs in nondomiciliary state); *Ott v. Mississippi Valley Barge Line Co.,* 336 U.S. 169 (1949) (instrumentality of commerce operating within a nondomiciliary jurisdiction may be required to pay its fair share of tax burden even when not operating on fixed schedules); *Johnson Oil Refining Co. v. Oklahoma ex rel. Mitchell,* 290 U.S. 158, 162 (1933) (habitual employment in

nondomiciliary state establishes tax situs); *American Refrigerator Transit Co. v. Hall* 174 U.S. 70, 82 (1899) (habitual employment in nondomiciliary state permits taxation of railroad cars on an apportioned basis).

The Florida Court of Appeal, in upholding completely unapportioned taxation of instrumentalities of interstate commerce and related property used by Ringling Bros. in such commerce, subjects that property to the risk of multiple taxation and thereby discriminates against Ringling Bros. in favor of wholly intrastate businesses whose property is not subject to tax in other jurisdictions. If the decision of the Florida Court of Appeal is permitted to stand, a forbidden burden on and discrimination against interstate commerce is encouraged.

CONCLUSION

The decision of the Florida Court of Appeal fails to recognize and follow constitutionally mandated principles of tax apportionment in applying the relevant Florida tax statutes. The error of the decision and the conflict it creates with decisions of this Court and other federal and state courts raises substantial constitutional questions which, if not now resolved, will have a far-reaching deleterious effect on interstate and foreign commerce. For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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January 24, 1980

APPENDIX

JOHN W. MIKOS, as property appraiser of Sarasota County, Florida, and Harry L. Coe, Jr., as executive director of the Department of Revenue of the State of Florida (formerly J. Ed Straughn), Appellants-Cross-Appellees,

v.

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., a Delaware Corporation, the Board of Tax Adjustment In and For Sarasota County, Florida, and Miss Charlie Hagerman, as tax collector of Sarasota County, Florida, Appellees-Cross-Appellants.

No. 78-316.

**District Court of Appeal of Florida,
Second District.**

Jan. 19, 1979

Rehearing Denied March 21, 1979.

BOARDMAN, Judge.

Appellants/defendants, John W. Mikos, as property appraiser for Sarasota County, and Harry L. Coe, Jr., as executive director of the Department of Revenue of Florida, appeal the final judgment entered in favor of appellee/plaintiff Ringling Bros.-Barnum & Bailey Combined Shows, Inc. We focus on the question of whether certain tangible personal property owned by appellee is subject to taxation on a portion of its value based on the number of days it is in the state annually rather than taxation at 100% of its value.

Ringling is a Delaware corporation in the business of staging circus performances. During the tax years involved, 1972 through 1976, its principal place of business was Washing-

ton, D.C. It is authorized to do business in Florida as a foreign corporation. It has approximately 650 employees. Eighty-five employees, including all the executive officers, are based in Washington, D.C. where all administrative and executive functions are conducted. Eleven employees are based in Venice, Florida, where Ringling maintains permanent facilities.

Two separate shows, designated as the Red Unit and the Blue Unit, are produced. Approximately 280 persons travel with each unit. Each unit has its own equipment and animals (the tour property) and is transported throughout the United States and Canada on railroad cars (the railroad property) which are owned by Ringling. Each unit is accompanied by an average of thirty-four railroad cars which are moved from location to location by interstate common carriers. The common carriers provide the engines, cabooses, and crews. The railroad cars are used not only for transportation but also to house a majority of the performers. The shows tour an average of thirty-five states in approximately eleven months. Ringling enters into leases with the arenas where the shows are performed well in advance of each season.

Each show consists of approximately forty to fifty specialty acts and five production numbers. Each year Ringling conceives and produces one new show concept for either the Red Unit or the Blue Unit which tours for two years before it is changed. In the tax years involved, the shows were generally created and planned during the month of March at the Washington, D.C. headquarters. New costumes, props,[1] and equipment are manufactured and assembled in New York City during a period beginning in June and ending in November or December and then shipped to Venice, Florida. The purpose of the stay in Venice is to assemble and rehearse the show and to perform maintenance on equipment and the railroad property. The new show spends about ten weeks in Venice and then leaves on its tour throughout the country. The show then

[1] Ringling leases its costumes and props.

returns to Venice for about a month to refurbish and to add new acts. Thus, each unit spends some time every year in Venice. Both units were present in Venice on January 1 of each of the tax years involved. All of the tour and railroad property arrives at and departs from Sarasota County on pre-established, definite dates in accordance with itineraries for each unit. Some of the property is eventually retired to the facilities in Venice.

In 1971 all of the personal property of Ringling, including the tour and railroad property which was physically located at its Venice quarters on January 1, the date for annual assessment established by statute, was assessed at 100% of its value. Ringling objected to this assessment before the Board of Tax Adjustment for Sarasota County. After a hearing, the Board approved an agreement by which the value of the property was apportioned on the basis of the number of days in the year that the property was in Florida. In its 1972 tangible property tax return Ringling listed the value of the tour and railroad property on an apportioned basis in accordance with the 1971 agreement. However, the appraiser assessed the tour and railroad property at its full value and the Board of Tax Adjustment sustained the assessment over Ringling's objection. In the tax years 1973 to 1976 the appraiser continued to assess the tour and railroad property at its full value. The assessments as to the tour property for 1973 through 1976 and for the railroad property for 1973 and 1974 were sustained by the Board. However, the 1975 and 1976 assessments of the railroad property were disapproved because the Department of Revenue had determined that the railroad property was "private car line" property within the meaning of Section 193.085(4), Florida Statutes.[2] The property has not been subjected to ad valorem taxation by any other state.

[2] Because the issue of the propriety of taxing the railroad property as a "private car line" is not challenged, we do not consider it in this opinion.

After exhausting its administrative remedies, Ringling filed suit seeking cancellation or reduction of the tangible personal property tax. The assessments in dispute were for the tax years 1972 through 1976 as to the tour property and 1972 through 1974 as to the railroad property. The final judgment recited, among other things, the following:

> 2. That after an extensive review of the facts presented in this case, the Court finds that the Ringling tour and railroad property was not "permanently located" in Sarasota County, Florida, on the assessment date within the meaning of Florida taxing statutes applicable for each year involved in this consolidated case.
>
> 3. That Ringling tour property was subject to tangible personal property taxes by Sarasota County, Florida, but under the Constitution of the United States the tax must be an apportioned tax determined by multiplying the assessed value of the tour property by a fraction, the numerator of which is the number of days the tour property was physically present in Sarasota County during the year, and the denominator of which is the total number of days in the year, and it is so ordered.
>
> 4. That for the tax years 1972, 1973 and 1974, Plaintiff's railroad property is subject to tangible personal property taxation by Sarasota County, Florida, but the tax is to be an apportioned tax determined in the manner set forth in paragraph 3 above, and it is so ordered.

The tax assessor contends that the property was taxable at 100% of its value. In response, Ringling argues that if the property was subject to any tax, the apportionment adopted by the court was appropriate. Ringling asserts however, by cross-appeal, that the property was the subject of no tax whatsoever.

Under Florida law the situs of tangible personal property for taxation purposes is determined in accordance with Section 192.032 (2), Florida Statutes (1977), which provides that property shall be "permanently located" in the State of Florida on the assessment date of January 1.[3] The effect of the term "permanently located" in that section is to statutorily incorporate the doctrine of permanence as it applies to establishment of an actual tax situs.[4] Because there are no Florida statutory guidelines applicable to the establishment of the tax situs, the rules established by case law relevant to the doctrine of permanence should be applied to each situation.

Generally, movable tangible personal property has a situs in the domicil of the owner regardless of its actual location in that state on the assessment date. *Ayer & Lord Tie Co.* v. *Kentucky,* 202 U.S. 409, 26 S. Ct. 679, 50 L. Ed. 1082 (1906); 71 Am. Jur. 2d *State and Local Taxation* §§ 661-65 (1973). If on the date for assessment tangible personal property has acquired a situs in a nondomiciliary state, it is subject to a nondiscriminatory property tax in that state. *Old Dominion S.S. Co.* v. *Virginia,* 198 U.S. 299, 25 S. Ct. 686, 49 L.Ed. 1059 (1905). Tangible property which is physically present in a nondomiciliary jurisdiction for the sole purpose of transit through that state is not subject to property taxation there. *Kelley* v. *Rhoads,* 188 U.S. 1, 23 S. Ct. 259, 47 L.Ed. 359 (1902); *State and Local Taxation, supra,* §§ 658-63. Nonetheless, movable property may be subject to local taxation if there

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[3] At the outset we note what appears to be an inconsistency between the finding that the property was not "permanently located" in Sarasota County and the fact that the property was held subject to tangible personal property taxes on an apportioned basis. Under the wording of the statute, if the property were not permanently located in Sarasota County, we cannot see how it could be held subject to a tax in any amount.

[4] When the legislature first used the words "permanently located" in 1970 with reference to tangible personal property, we do not think they intended to limit more strictly the capacity of the state to tax than the constitutional standard of due process which requires tangibles of a nonresident to have acquired a tax situs in the taxing state.

is a break in the transit and the property has come to rest within the taxing entity's jurisdiction. *Minnesota* v. *Blasius,* 290 U.S. 1, 54 S. Ct. 34, 78 L.Ed. 131 (1933). If the purpose of the interruption, however, is incidental to transportation it is not taxable. *Champlain Realty Co.* v. *Town of Brattleboro,* 260 U.S. 366, 43 S. Ct. 146, 67 L.Ed. 309 (1922). Intent to transport the property to another jurisdiction at some later date does not exclude taxation by the state where it is more or less permanently located as of the date of assessment. *Susquehanna Coal Co.* v. *City of South Amboy,* 228 U.S. 665, 33 S. Ct. 712, 57 L.Ed. 1015 (1913).

In discussing the word permanent with respect to tax situs, the court in *City of Dallas v. Overton,* 363 S.W.2d 821, 825 (Tex. Ct. Civ. App. 1963), said:

> The term "permanent" as used in expressions relating to this rule of law is sometimes confusing. The term "permanent" is used in contra distinction of the term "temporary" or "transitory". The question of "permanency" is clarified considerably in Cooley, "Law of Taxation" Fourth Ed., § 452, as follows:
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> "In order to acquire a situs in a state or taxing district so as to be taxable in the state or district regardless of the domicile of the owner, tangible personal property must be more or less permanently located in the state or district. In other words, the situs of tangible personal property is where it is more or less permanently located rather than where it is in transit or temporarily and for no considerable length of time.
>
> * * *
>
> "The governing rule, as usually stated, is that the taxable situs depends on whether the property is 'permanently' within the state. However, in this connection, the word 'permanently' is apt to be misleading unless read

> in connection with the facts of the particular case. It means a more or less permanent location for the time being."

See also 110 A.L.R. pp. 707, 717:

> "The courts are all agreed that before tangible personal property may be taxed in a state other than its owner's domicil, it must acquire there a location more or less permanent. It is difficult to define the idea of permanency that this rule connotes. It is clear that 'permanency,' as used in this connection, does not convey the idea of the characteristics of the permanency of real estate. It merely involves the concept of being associated with the general mass of property in the state, as contrasted with a transient status—viz., likelihood of being in one state today and in another tomorrow."
>
> * * *
>
> Obviously the courts do not construe the term "permanent" to mean absolutely permanent, since movable property is seldom absolutely permanent.

In *Ray* v. *Board of County Comm'rs,* 173 Kan. 859, 863, 252 P.2d 899, 902 (1953), the court upheld a tax on construction equipment which had been brought into the state for approximately sixty days by a nondomiciliary contractor in order to do some road work. The court observed:

> As a general proposition, before tangible personal property may be taxed in a state other than the domicile of the owner it must have acquired a more or less permanent location in that state as contrasted to a transient status. Within the meaning of the rule "permanency" has been held to mean a more or less permanent location, for the time being, one test being whether the property in question is within the state solely for use and profit there.

The Supreme Court of Wisconsin reached a similar conclusion in another construction equipment case. Thus, in *Town*

of Cady v. *Alexander Construction Co.,* 12 Wis.2d 236, 243, 107 N.W.2d 267, 271 (1961), the court reasoned:

> In the instant case the construction equipment was in the state of Wisconsin for somewhat less than a year and was not in transit or merely passing through the state, but was being used by its owner for the construction of a highway. True, the owner intended to remove the property upon completion of the contract, but the intention of the owner is not the deciding factor in determining the taxable status of personal property. During the months that the property was in Wisconsin, it and its owner received the benefits of our laws, the same as similar property so owned and used by Wisconsin residents. From the standpoint of the nonresident owner, it is true the property was in Wisconsin temporarily in a broad sense, but temporary is a relative term. The length of time the property was in Wisconsin depended upon the size of the construction job. The property was used for the purpose for which it was constructed and for the benefit of its owner's business. The property, in our opinion, had sufficient contact with this state to acquire a taxable situs and to justify a personal-property tax thereon by the state.

Reversing the trial judge for having given the word "permanent" in Section 192.032 too narrow an application, our sister court, in *Overstreet* v. *Sea Containers, Inc.,* 348 So.2d 628, 630 (Fla. 3d DCA 1977), said:

> In *City of Lakeland* v. *Lawson Music Co.,* Inc., 301 So.2d 506 (Fla. 2d DCA 1974), the court opined that for purposes of taxation, the word "permanent" in a taxing statute does not always denote lasting forever, and does not always have a meaning opposite to temporary.
>
> "In tax cases the requirement of permanency has been found satisfied where presence is consistent with continuity and not sporadically or temporarily present." *Supra,* 301 So.2d 508 at 508.

In addition, on the Federal level, the Court of Appeals for the District of Columbia has held that permanency, in the sense that personal property must be fixed like real property is not essential to the establishment of a taxable situs. *District of Columbia* v. *Smoot Sand & Gravel Corp.,* 87 U.S. App. D.C. 248, 184 F.2d 987 (1950).

Though the facts were unique, the case is significant because the court construed the permanence required by the statute by drawing upon the general definition applicable to the acquisition of a tax situs in a nondomiciliary state.

Taxes on commodities or articles of trade have often been upheld so long as the items are not in the stream of interstate commerce. Thus, even though it is evident that commodities are intended to be shipped beyond the state boundary shortly after the assessment date, they have been held to be subject to taxation by a nondomiciliary state so long as the journey has not commenced. *Diamond Match Co.* v. *Village of Ontonagon,* 188 U.S. 82, 23 S.Ct. 266, 47 L.Ed. 394 (1903); *Coe* v. *Town of Errol,* 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715 (1886). Likewise, when the interstate transit has been interrupted for purposes other than those which are necessarily incident to the transportation, the commodities have not been deemed protected from taxation. *Minnesota* v. *Blasius, supra; Bacon* v. *Illinois,* 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615 (1913). In this type of case the courts consistently seem to require much less in the way of a showing of permanence for purposes of the acquiring of a tax situs. *See Clark, A State's Tax Jurisdiction as Limited by the United States Constitution,* 13 U. Fla. L.Rev. 401, 421 (1960).

Applying these principles to the undisputed facts of the case before us, we are persuaded that the subject property acquired a situs in Sarasota County, Florida, for the purpose of tangible personal property taxation. The property was not within the "stream of commerce" while it was located in Sarasota County, and the purpose of the annual stays in Venice were distinct from those incidental to transportation. While

Ringling intended to transport the property out of the state each year, Ringling also intended to bring it back at the conclusion of each tour. The property enjoyed the protection of the state to such a degree that its owner should be required to contribute to the state's maintenance.

Because we have held that the property was taxable by Sarasota County, the second issue we must address is whether it is taxable at its full value.

The majority of the many cases cited by the parties to this appeal deal with instrumentalities continually employed in interstate commerce, such as boats, trains, and airplanes. These cases hold that such items of property are subject to taxation by a nondomiciliary state if there is sufficient activity within the state but then only upon an apportioned basis.[5] *Braniff Airways* v. *Nebraska State Board,* 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967 (1954); *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613 (1891). These are primarily cases involving fleets of vehicles in which no one vehicle is in the taxing state for an appreciable length of time, yet, as an entity, the fleet itself has a very substantial connection with the state. For example in *Johnson Oil Refining Co.* v. *Oklahoma ex rel. Mitchell,* 290 U.S. 158, 54 S.Ct. 152, 78 L.Ed. 238 (1933), the Court held that the average number of railroad cars, but not the whole fleet of cars owned by the taxpayer, which operated within the jurisdiction was taxable although no one car had an actual situs in that state. The rule of these cases is that any ad valorem tax on movable, tangible personal property which is in the stream of interstate commerce at the time the tax accrues must be apportioned so as to avoid an

[5] Apparently, the trial judge relied on these cases when he determined that Sarasota County did have authority to tax on an apportioned basis. However, we do not view Ringling's railroad property as an instrumentality in the same sense as the cars involved in the cases referred to above. Ringling simply used its railroad property to haul its own show from place to place, and for purposes of analysis, the railroad property's tax status was no different from that of Ringling's tour property.

undue burden on interstate commerce.[6] *See, e.g., Ott* v. *Mississippi Valley Barge Line Co.,* 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585 (1949).

Although we recognize this well established rule of apportionment and appreciate the reasoning supporting it, there is no constitutional requirement that an apportionment formula be applied to movable property which has not entered or has left the stream of interstate commerce. Clearly, the commerce clause would not be involved. The due process clause does not require that in all circumstances there be *quid pro quo* between the tax paid and the benefits received. See *Developments in the Law-Federal Limitations on the State Taxation of Interstate Business,* 75 Harv.L.Rev. 953 (1962). The statement by the United States Supreme Court that when a state has the power to levy a tax on property it must do so in "relation to opportunities, benefits, or protection conferred or afforded by the taxing State" is to remind the states that the property it seeks to tax must have a sufficient relationship to their jurisdictional boundaries.[7] *Ott* v. *Mississippi Barge Line,*

[6] This analysis does no harm to the rule that the owner's domiciliary state may tax personalty if no other tax situs for the property has been established. Property which is continually involved in interstate commerce while in a nondomiciliary state is subject only to a tax on the portion of its value representing the nexus between that state and the property. The domiciliary state, however, would be authorized to tax that property not only on the basis of the nexus between the property and its jurisdiction but also may tax any portion not taxed by another authority. *Johnson Oil Refining Co.* v. *Oklahoma ex rel. Mitchell,* 290 U.S. 157, 54 S.Ct. 152, 78 L.Ed. 238 (1933). Of course, if the property is permanently removed from the domiciliary, it may not tax that property at all. 71 Am.Jur.2d *State and Local Taxation* §§ 66465 (1973).

[7] A taxing authority may choose to apportion its tax to reflect a direct relation between the tax paid and benefits enjoyed such as was done in *Ice Capades* v. *Los Angeles,* 56 Cal.App.3d 745, 128 Cal.Rptr. 717 (1976). This would avoid the burden of double taxation where an actual situs has been established in more than one jurisdiction. A state is not, however, obliged to avoid double taxation in this circumstance, even though such a result is favored when interpreting tax statutes. *State and Local Taxation* §§ 31-41, *supra,* n.6.

supra, at 174, 69 S.Ct. at 434, 93 L.Ed. at 589. *See Wisconsin* v. *J.C. Penney Co.,* 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940).

The trial court was in error when it found that only an apportioned tax could be levied against the tour and railroad property. The property is to be treated like any other movable, tangible personal property in the state, and it is subject to taxation at 100% of its value.

REVERSED and REMANDED.
GRIMES, C. J. and RYDER, J., concur.

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR SARASOTA COUNTY

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., etc.,
Plaintiff,

vs.

JOHN W. MIKOS, etc., et al.,
Defendants.

Case Nos. 72-1806, 74-209, 74-2941, 75-3054, 76-2622

ORDER

This cause having come on before me for final trial on November 18, 19 and 20, 1976, and after due consideration of the extensive and voluminous proceedings, the pre-trial stipulation and order, and the memorandum of law duly submitted by the parties, and being otherwise duly advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. That the pre-trial stipulation and order confirming same is hereby incorporated herein, and the facts contained therein are found to be additional facts supporting this order.

2. That after an extensive review of the facts presented in this case, the Court finds that the Ringling tour and railroad property was not "permanently located" in Sarasota County, Florida, on the assessment date within the meaning of Florida taxing statutes applicable for each year involved in this consolidated case.

3. That Ringling tour property was subject to tangible personal property taxes by Sarasota County, Florida, but

under the Constitution of the United States the tax must be an apportioned tax determined by multiplying the assessed value of the tour property by a fraction, the numerator of which is the number of days the tour property was physically present in Sarasota County during the year, and the denominator of which is the total number of days in the year, and it is so ordered.

4. That for the tax years 1972, 1973 and 1974, Plaintiff's railroad property is subject to tangible personal property taxation by Sarasota County, Florida, but the tax is to be an apportioned tax determined in the manner set forth in paragraph 3 above, and it is so ordered.

5. That the twenty percent (20%) penalty for failure to timely file a return was properly imposed against Ringling for the tax year of 1972; however, the amount of such penalty is to be based on the apportioned tax payable by Ringling in accordance with paragraph 3 above, and it is so ordered.

DONE AND ORDERED in Chambers at Sarasota, Florida, this 25th day of April, 1977.

/s/ LYNN N. SILVERTOOTH
Circuit Judge

Conformed copies to:

JOHN C. DENT, JR., ESQ.
GRANVILLE H. CRABTREE JR., ESQ.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
IN AND FOR THE SECOND DISTRICT
WEDNESDAY, MARCH 21, 1979

JOHN W. MIKOS, as property appraiser of Sarasota County, Florida, and HARRY L. COE, JR, as executive director of the Department of Revenue of the State of Florida (formerly J. ED STRAUGHN)

Appellants/
Cross-Appellees,

v.

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., a Delaware corporation, THE BOARD OF TAX ADJUSTMENT IN AND FOR SARASOTA COUNTY, FLORIDA, and MISS CHARLIE HAGERMAN, as tax collector of Sarasota County, Florida,

Appellees/
Cross-Appellants.

Case No. 78-316

Counsel for appellee, Ringling Bros.-Barnum & Bailey Combined Shows, Inc., having filed in this cause a Motion for Rehearing and the same having been considered by the Court, it is

ORDERED that said Motion be and the same is hereby denied. It is further

ORDERED that the Suggestion of Question of Great Public Interest filed by counsel for appellee is hereby denied.

A True Copy

TEST:

/s/ WILLIAM A. HADDAD

Clerk, District Court of Appeal
Second District

cc: GRANVILLE H. CRABTREE, JR.
SHELDON V. EKMAN
JOHN C. DENT, JR.

IN THE SUPREME COURT OF FLORIDA
FRIDAY, OCTOBER 26, 1979

RINGLING BROTHERS-BARNUM & BAILEY COMBINED SHOWS, INC., etc., *Petitioner/Appellant,* v. JOHN W. MIKOS, etc., et al., *Respondents/Appellees.*	Case No. 56,661 District Court of Appeal, Second District 78-316

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied and the appeal dismissed.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur
ADKINS, Acting C.J., dissents.

A True Copy
TEST:

Clerk, Supreme Court

/s/ DEBBIE CAUSSEAUX

By:
Deputy Clerk

TC
cc: Hon. WILLIAM A. HADDAD, Clerk
Hon. LYNN N. SILVERTOOTH, Judge
Hon. R. H. HACKNEY, JR., Clerk

GRANVILLE H. CRABTREE, JR., ESQUIRE
SHELDON V. EKMAN, ESQ.
JOHN C. DENT, JR., ESQUIRE

IN THE SUPREME COURT OF FLORIDA

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., etc., *Appellant,* v. JOHN W. MIKOS, as Property Appraiser of Sarasota County, Florida, and RANDY MILLER, as Executive Director of the Department of Revenue of the State of Florida, *Appellees.*	Case No. 56,661

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ringling Bros.-Barnum & Bailey Combined Shows, Inc., etc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Second District Court of Appeal of the State of Florida rendered in this action on March 21, 1979, appeal of which was dismissed and certiorari denied by the Supreme Court of the State of Florida on October 26, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

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and

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Attorneys for Appellant

By /s/ SHELDON V. EKMAN
Sheldon V. Ekman

[Filed: January 14, 1980]

IN THE SECOND DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., etc., *Appellant,* v. JOHN W. MIKOS, as Property Appraiser of Sarasota County, Florida, and RANDY MILLER, as Executive Director of the Department of Revenue of the State of Florida, *Appellees.*	Case No. 78-316

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ringling Bros.-Barnum & Bailey Combined Shows, Inc., etc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Second District Court of Appeal of the State of Florida rendered in this action on March 21, 1979, appeal of which was dismissed and certiorari denied by the Supreme Court of the State of Florida on October 26, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

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Attorneys for Appellant

By /s/ SHELDON V. EKMAN
Sheldon V. Ekman

[Filed: January 15, 1980]

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR SARASOTA COUNTY

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., etc., *Appellant,* v. JOHN W. MILOS, as Property Appraiser of Sarasota County, Florida, and RANDY MILLER, as Executive Director of the Department of Revenue of the State of Florida, *Appellees.*	Case Numbers 72-1806 74-209 74-2941 75-3054 76-2622

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ringling Bros.-Barnum & Bailey Combined Shows, Inc., etc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Second District Court of Appeal of the State of Florida rendered in this action on March 21, 1979, appeal of which was dismissed and certiorari denied by the Supreme Court of the State of Florida on October 26, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

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Attorneys for Appellant

By /s/ SHELDON V. EKMAN
Sheldon V. Ekman

[Filed: January 17, 1980]

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR SARASOTA COUNTY

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., etc, *Plaintiff,* vs. JOHN W. MIKOS, etc., et al., *Defendants.*	Case Numbers 72-1806, 74-209, 74-2941, 75-3054, 76-2622

STIPULATION FOR PRE-TRIAL ORDER

The parties hereto hereby stipulate as follows:

I.
CONSOLIDATION

1. That henceforth the above numbered cases shall be consolidated and shall be styled as reflected above.

2. That the parties hereto acknowledge that previously some of the heretofore filed cases that have the number as reflected above had as parties defendant the Board of Tax Adjustment of Sarasota County, Florida, and the Tax Collector of Sarasota County, Florida but that by prior stipulation and subsequent Order, said parties have been dismissed; however, that the said parties who have been dismissed shall be bound by the final Order rendered in this case in the event said Order does affect that particular office or board.

II.
JURISDICTION

3. The consolidated actions involve the tangible property taxation of certain property of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. ("Ringling") and were filed in accordance with Section 194.171 of the Florida Statutes.

4. In accordance with Section 194.171(3) of the Florida Statutes, Ringling has paid the amount of tax which it admits in good faith to be owing with respect to its property.

5. Ringling has exhausted its administrative remedies under Chapter 194 of the Florida Statutes as petitions were duly filed and hearings held on such petitions by the Board of Tax Adjustment ("Board") in each of the years in dispute.

6. Defendants John W. Mikos ("Mikos") and J. Ed Straughn ("Straughn") are parties defendant in the consolidated actions in accordance with Section 194.181 of the Florida Statutes.

7. That in each of the above numbered cases that have been consolidated, there have been motions filed by the defendants or plaintiffs and the Court has heretofore entered an appropriate Order on each of the motions and that all of the said cases are now at issue.

III.
UNCONTESTED FACTS

Parties

8. Plaintiff, Ringling, was at all times relevant hereto a foreign corporation duly organized and existing under the laws of the State of Delaware with its principal place of business at 1015 18th Street, N.W., Washington, D.C.

9. Ringling was at all times relevant hereto duly authorized and qualified to do business in the State of Florida as a foreign corporation.

10. Defendant Mikos was at all times relevant hereto the duly qualified Tax Assessor or Property Appraiser of Sarasota County, Florida.

11. Defendant Straughn was at all times relevant hereto the Executive Director of the Department of Revenue of the State of Florida ("Department").

Tangible Property Tax Assessments

12. The consolidated actions concern the Sarasota County tangible personal property tax assessments of the animals and equipment used by Ringling's traveling circus units ("Tour Property") and the railroad rolling stock used to transport the Tour Property and the performers of the traveling circus units ("Railroad Property"). The assessment of the Railroad Property for the 1975 and 1976 tax years, however, is not in dispute in this proceeding.

13. The tangible personal property tax assessments of the Tour and Railroad Property for the years in dispute were as follows:

	Tour Property	Railroad Property
1972	$340,920	$537,740
1973	396,230	912,300
1974	481,930	2,036,510
1975	344,740	
1976	312,260	

The Tour and Railroad Property

14. The Tour and Railroad Property was used by Ringling exclusively in the presentation and transportation, respectively, of its two separate traveling circus shows respectively designated as the Red and Blue Units.

15. Ringling stages its circuses across the breadth of the United States and Canada exclusively indoors in arenas or auditoriums. Ringling enters into contracts or leases with the owners or operators of various arenas for the dates during which each show will be played. The contracts or leases are made well in advance of each season, so that each Unit may have a two-year operating schedule.

16. In the years in dispute the Red and Blue Units combined played in an average of 35 states, including Florida.

17. The total number of performances given by both Units in each of the years in dispute, and the number of such performances given in the State of Florida and in Sarasota County, is as follows:

	Number of Performances	Number in Florida	Percentage	Number in Sara. Co.	Percentage
1972	992	68	6.8	12	1.0
1973	1,018	56	5.5	12	1.2
1974	985	56	6.0	12	1.0
1975	995	62	6.23	12	1.21
1976(est)	1,023	68	6.64	12	1.56

Of the gross receipts of Ringling derived from the foregoing performances of the two Units, the percentage of gross receipts received from performances in the State of Florida, inclusive of the performances in Sarasota County, were as follows:

	Performances in Florida	Performances in Sarasota County
1972	5.5	0.81
1973	5.0	0.8
1974	6.0	1.0
1975	4.95	0.78
1976 (est)	5.5	0.8

The Units presented a greater number of performances each year in several states, including New York and California, than were presented in Florida.

18. The specific number of days the Tour and Railroad Property of the Red and Blue Units were physically located in Sarasota County, Florida, during the years in question are as follows:

	Red Unit	Blue Unit
1972	44	34
1973	32	74
1974	83	34
1975	34	79
1976	80 (est.)	28 (est.)

19. After each engagement, the Tour Property was transported by Ringling-owned trains (the Railroad Property) to the next engagement. Ringling operated two trains, one for each Unit. Each train consisted of an average of 34 railroad cars. Ringling entered into agreements annually with a number of interstate common carriers by railraod which agreed to move the circus trains from location to location. These common carriers furnished engines, cabooses and crews and coordinated the scheduling and logistical work with a representative of Ringling.

20. All of the Tour and Railroad Property was brought to and departed from Sarasota County on pre-established definite dates in accordance with the itineraries for each Unit. The exact dates on which the Tour and Railroad Property arrived and departed from Sarasota County in the years in dispute are as follows:

	Red Unit		Blue Unit	
	Departure	Arrival	Departure	Arrival
1972	Feb. 14	Nov. 22	Jan. 10	Dec. 8
1973	Jan. 8	Dec. 5	Feb. 12	Nov. 21
1974	Feb. 11	Nov. 20	Jan. 7	Dec. 4
1975	Jan. 6	Dec. 3	Feb. 6	Nov. 19
1976	Feb. 12	Nov. 24 (est.)	Jan. 5	Dec. 8 (est.)

21. As with all other engagements, a majority of the performers lived on the trains while in Sarasota County. After the trains left Sarasota County each year, there was some property that remained in Sarasota County, in Venice, Florida, the property taxes on which have been paid by Ringling and are not in dispute in this proceeding.

Status of Railroad Property as Private Car Line Property

22. For the 1975 and 1976 tax years, the Department has determined that Ringling qualifies as a private car line company within the meaning of Section 193.085(4) of the Florida Statutes with respect to the property taxation of the Railroad Property.

23. On September 18, 1973, Ringling filed an Annual Report with the Department for the 1973 tax year as a private car line company.

24. The Department has never made a formal determination that Ringling would or would not qualify as a private car line for 1973.

25. On March 28, 1974, Ringling duly filed an Annual Report with the Department for the 1974 tax year as a private car line company.

26. On June 12, 1974, Straughn, as Executive Director of the Department, advised Ringling by letter that the Department had determined that for the 1974 tax year Ringling's Railroad Property was not private car line property within the meaning of Sections 193.052(6) and 193.085 of the Florida Statutes and the applicable regulations.

IV.

AMENDMENTS TO PLEADINGS

27. There are no amendments to the pleadings in the consolidated actions except the parties have agreed that the Plaintiff's complaints in Case No. 74-209 and Case No. 72-1806 shall be deemed to be amended to include a prayer for relief that the Railroad Property qualifies as private car line property under Chapter 193 of the Florida Statutes for the 1972 and 1973 tax years.

28. Defendants Miss Charlie Hagerman (deceased), Rebecca M. Eger, and Board, by stipulations of the parties and final orders of this Court have been dismissed as parties to the consolidated actions.

V.

LEGAL ISSUES TO BE TRIED

29. The issues to be tried are as follows:

1. Is the Tour and Railroad Property of the Plaintiff "permanently located" within Sarasota County within the meaning of Section 192.032(2) of the Florida Statutes?

2. Do the assessments of the Tour and Railroad Property constitute an undue burden upon interstate commerce under Article I, Section 8 of the Constitution of the United States and/or a violation of due process under Section 1 of Amendment XIV of the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida?

3. Are the 1972, 1973 and 1974 assessments of the Railroad Property null and void because the Railroad Property should have been assessed by the Department and taxed as private car line company property under Chapter 193 of the Florida Statutes and Chapter 12B-1 of the Regulations of the Department?

4. Was the twenty percent (20%) penalty for failure to timely file a return properly imposed against Ringling in 1972?

VI.

WITNESSES TO BE CALLED AT TRIAL

30. The parties intend to call the following witnesses for the trial:

(a) For the Plaintiff:

(1) William Rowe (by deposition dated January 24, 1973)

(2) Miss Charlie Hagerman (by deposition dated January 24, 1973)

(3) Allan J. Bloom

(4) Charles F. Smith

(5) Duane D. Davis, Jr.

(5) [*sic*] Robert Maio

(6) Max Weldy

(b) For the Defendant:

(1) John W. Mikos

(2) Honore Noncek

(3) Henry Chapman

(4) Richard Brown

(5) Michael W. Corradino

(6) Larry DeFrances

(7) Allen J. Bloom

(8) Duane B. Davis, Jr.

(9) Charles Smith

(10) R.H. Bundy

(11) Jack Briggs

(12) Arthur Concello

VII.

DOCUMENTS AND DEPOSITIONS TESTIMONY

31. The parties intend to offer documents, which are approved by the parties hereto as to authenticity, but objections as to relevancy, materiality and admissibility are reserved, which documents are as follows:

(a) For the Plaintiff:

(1) Ringling's 1972-76 tangible personal property tax returns for Sarasota County, Florida;

(2) Ringling's 1973-75 Annual Reports as a private car line company under the Florida Statutes;

(3) Ringling's 1972-76 petitions to the Board of Tax Adjustment in and for Sarasota County, Florida;

(4) "Official Tours" for 1972-76 of the Red and Blue Units of the Ringling Bros.-Barnum & Bailey Circus;

(5) Transcripts of the 1974 and 1976 proceedings with respect to Ringling's petitions before the Board of Tax Adjustment in and for Sarasota County, Florida;

(6) Ringling's 1971-76 Sarasota County, Florida tangible personal property tax bills;

(7) 1976 decision of the Board of Tax Adjustment in and for Sarasota County, Florida with respect to Ringling's petition;

(8) Letter of Straughn to Ringling dated June 12, 1974;

(9) Letter of Sydney H. McKenzie III, Esq., Assistant Attorney General of the State of Florida, to Ringling dated October 22, 1974;

(10) Letter of William R. Cave, Division Director, Ad Valorem Tax Division, State of Florida, Department of Revenue, to Ringling dated March 28, 1975;

(11) State of Florida, Department of Revenue, Final Order of Assessment of Ringling as a private car line company dated May 28, 1976;

(12) Letter of John C. Dent, Jr., to John W. Mikos dated February 17, 1972;

(13) Lease between City of Venice, Florida, and Ringling, dated January 31, 1960;

(14) Letter of Lewis Jacobs, General Counsel for Ringling to Marion Braswell, City Attorney of Venice, Florida, dated December 3, 1967;

(15) Letter of Smyth D. Brohard, Mayor of Venice, Florida, to Lewis Jacobs, dated December 11, 1967;

(16) Official minutes of meeting of Board of Tax Adjustment of Sarasota County, Florida, dated August 4, 1971, as they appear in Book 1, pages 24 and 25;

(17) Maintenance program for Ringling rolling stock.

(b) For the Defendant:

(1) Statutes from all other states to which Plaintiff alleges it pays taxes with respect to the Tour and Railroad Property;

(2) Tax returns filed by Ringling in Sarasota County and the State of Florida;

(3) Tax returns filed by Ringling in states in which tangible personal property is a factor in the tax computation;

(4) Homestead exemption forms;

(5) Lease between City of Venice and Ringling and all amendments thereto.

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COMBINED SHOWS, INC.

By: /s/ GRANVILLE H. CRABTREE, JR.
Granville H. Crabtree, Jr.

PRE-TRIAL ORDER

This cause having come on before me on the above Stipulation and the Court being otherwise duly advised in the premises, it is

ORDERED AND ADJUDGED that the above stipulation is incorporated and made an Order of this Court.

DONE AND ORDERED IN CHAMBERS, this 8th day of November, 1976.

/s/ LYNN N. SILVERTOOTH
Circuit Judge

Conformed copies to:
JOHN C. DENT, JR.
GRANVILLE H. CRABTREE, JR.

TOUR SCHEDULES—1972-1976

1972 SEASON

RED UNIT

Date	Town	State
Feb. 11-13	Venice	Florida
Feb. 16-20	Greenville	South Carolina
Feb. 22-23	Savannah	Georgia
Feb. 25-27	Fayetteville	North Carolina
Mar. 1-5	Knoxville	Tennessee
Mar. 8-12	Charleston	West Virginia
Mar. 15-Apr. 11	Washington	District of Columbia
Apr. 14-16	Columbia	South Carolina
Apr. 18-19	Macon	Georgia
Apr. 21-23	Birmingham	Alabama
Apr. 27-May 2	Toronto	Ontario
May 4-7	Kitchener	Ontario
May 16-29	Boston	Massachusetts
June 1-4	Hampton	Virginia
June 8-11	Waco	Texas
June 13-14	Lubbock	Texas
June 16-18	Amarillo	Texas
June 20-21	Abilene	Texas
June 23-26	Tulsa	Oklahoma
June 28-July 5	Houston	Texas
July 7-9	Baton Rouge	Louisiana
July 12-13	Frankfurt	Kentucky
July 14-17	Louisville	Kentucky
July 19-23	Memphis	Tennessee
July 25-30	Kansas City	Missouri
Aug. 3-6	Des Moines	Iowa
Aug. 7-8	Waterloo	Iowa
Aug. 11-13	Bismark	North Dakota
Aug. 15-16	Butte	Montana
Aug. 18-20	Spokane	Washington
Aug. 23-28	Salt Lake City	Utah
Aug. 31-Sept. 3	Las Vegas	Nevada
Sept. 6-12	Seattle	Washington
Sept. 14-18	Portland	Oregon
Sept. 20-24	Vancouver	British Columbia
Sept. 28-Oct. 1	St. Paul	Minnesota

1972 SEASON

RED UNIT (continued)

Date	Town	State
Oct. 10-11	Madison	Wisconsin
Oct. 12-15	Milwaukee	Wisconsin
Oct. 18-22	Omaha	Nebraska
Oct. 25-29	Indianapolis	Indiana
Nov. 1-5	Detroit	Michigan
Nov. 8-13	Cleveland	Ohio
Nov. 16-19	Springfield	Massachusetts

1972 SEASON

BLUE UNIT

Jan. 7-9	Venice	Florida
Jan. 11-16	St. Petersburg	Florida
Jan. 17-19	TV Taping—St. Petersburg	
Jan. 21-25	West Palm Beach	Florida
Jan. 26-Feb. 1	Miami Beach	Florida
Feb. 3-6	Jacksonville	Florida
Feb. 8-13	Greensboro	North Carolina
Feb. 16-21	Norfolk	Virginia
Feb. 23-28	Richmond	Virginia
Mar. 2-13	Baltimore	Maryland
Mar. 15-19	Charlotte	North Carolina
Mar. 21-26	Raleigh	North Carolina
Mar. 28-May 29	New York City	New York
May 31-June 6	Philadelphia	Pennsylvania
June 8-June 11	Hershey	Pennsylvania
June 14-18	Nashville	Tennessee
June 21-25	Oklahoma City	Oklahoma
June 27-28	Little Rock	Arkansas
June 30-July 2	San Antonio	Texas
July 4-9	Dallas	Texas
July 10-12	Forth Worth	Texas
July 14-17	Tucson	Arizona
July 19-23	Phoenix	Arizona
July 25-Aug. 9	Inglewood	California

1972 SEASON

BLUE UNIT (continued)

Date	Town	State
Aug. 10-13	Long Beach	California
Aug. 14-22	Anaheim	California
Aug. 24-29	Oakland	California
Aug. 30-Sept. 4	San Francisco	California
Sept. 6-10	San Diego	California
Sept. 12-17	Fresno	California
Sept. 20-24	Denver	Colorado
Sept. 27-Oct. 1	Cincinnati	Ohio
Oct. 3-23	Chicago	Illinois
Oct. 25-29	Pittsburgh	Pennsylvania
Oct. 31-Nov. 12	Nassau County	Long Island, N.Y.
Nov. 14-19	Ottawa	Ontario, Canada
Nov. 21-26	Quebec City	Quebec, Canada
Nov. 29-Dec. 3	New Haven	Connecticut

1973 SEASON

RED UNIT

Jan. 5-7	Venice	Florida
Jan. 9-14	St. Petersburg	Florida
Jan. 15-17	TV Taping, St. Petersburg	Florida
Jan. 19-23	West Palm Beach	Florida
Jan. 24-30	Miami Beach	Florida
Feb. 1-4	Jacksonville	Florida
Feb. 6-11	Greensboro	North Carolina
Feb. 13-14	Macon	Georgia
Feb. 16-19	Fayetteville	North Carolina
Feb. 21-27	Richmond	Virginia
Mar. 1-12	Baltimore	Maryland
Mar. 14-18	Raleigh	North Carolina
Mar. 20-25	Norfolk	Virginia
Mar. 27-May 28	New York	New York
May 30-June 5	Philadelphia	Pennsylvania
June 7-10	Hershey	Pennsylvania
June 14-17	Little Rock	Arkansas

1973 SEASON

RED UNIT (continued)

Date	Town	State
June 20-24	Oklahoma City	Oklahoma
June 27-July 1	Dallas	Texas
July 2-3	Fort Worth	Texas
July 5-8	San Antonio	Texas
July 10-15	Phoenix	Arizona
July 17-22	Tucson	Arizona
July 24-Aug. 8	Inglewood	California
Aug. 9-12	Long Beach	California
Aug. 13-21	Anaheim	California
Aug. 23-28	Oakland	California
Aug. 29-Sept. 3	San Francisco	California
Sept. 5-9	Fresno	California
Sept. 11-16	San Diego	California
Sept. 19-23	Denver	Colorado
Sept. 26-30	Cincinnati	Ohio
Oct. 2-22	Chicago	Illinois
Oct. 25-28	Ottawa	Ontario
Oct. 30-Nov. 4	Quebec City	Quebec
Nov. 7-19	Nassau, L.I.	New York
Nov. 21-25	New Haven	Connecticut
Nov. 27-Dec. 2	Springfield	Massachusetts

1973 SEASON

BLUE UNIT

Feb. 9-11	Venice	Florida
Feb. 14-25	Atlanta	Georgia
Feb. 27-28	Savannah	Georgia
Mar. 2-4	Columbia	South Carolina
Mar. 6-11	Greenville	South Carolina
Mar. 14-18	Charleston	West Virginia
Mar. 20-25	Knoxville	Tennessee
Mar. 27-Apr. 1	Charlotte	North Carolina
Apr. 3-30	Washington	District of Columbia
May 3-9	Toronto	Ontario
May 10-13	Kitchener	Ontario

1973 SEASON

BLUE UNIT (continued)

Date	Town	State
May 15-28	Boston	Massachusetts
May 29-June 3	Providence	Rhode Island
June 5-6	Binghamton	New York
June 8-10	Hampton	Virginia
June 15-17	Lubbock	Texas
June 19-20	Albuquerque	New Mexico
June 22-24	El Paso	Texas
June 26-27	Amarillo	Texas
June 29-July 2	Tulsa	Oklahoma
July 4-11	Houston	Texas
July 13-15	Shreveport	Louisiana
July 17-18	Jackson	Mississippi
July 20-22	Alexandria	Louisiana
July 24-25	Mobile	Alabama
July 27-30	Memphis	Tennessee
Aug. 2-5	Des Moines	Iowa
Aug. 7-8	Waterloo	Iowa
Aug. 10-13	Omaha	Nebraska
Aug. 15-19	Kansas City	Missouri
Aug. 22-28	Salt Lake City	Utah
Aug. 31-Sept. 2	Spokane	Washington
Sept. 5-10	Seattle	Washington
Sept. 12-16	Portland	Oregon
Sept. 19-23	Vancouver	British Columbia
Sept. 27-30	Bloomington	Minnesota
Oct. 3-7	Indianapolis	Indiana
Oct. 9-10	Dayton	Ohio
Oct. 12-14	Champaign	Illinois
Oct. 16-17	Saginaw	Michigan
Oct. 19-21	Kalamazoo	Michigan
Oct. 24-28	Nashville	Tennessee
Oct. 31-Nov. 4	Pittsburgh	Pennsylvania
Nov. 6-11	Detroit	Michigan
Nov. 13-18	Cleveland	Ohio

1974 SEASON

RED UNIT

Date	Town	State
Feb. 8-10	Venice	Florida
Feb. 13-25	Atlanta	Georgia
Feb. 27-Mar. 3	Greenville	South Carolina
Mar. 5-6	Savannah	Georgia
Mar. 8-10	Columbia	South Carolina
Mar. 13-17	Charleston	West Virginia
Mar. 19-24	Knoxville	Tennessee
Mar. 26-31	Charlotte	North Carolina
Apr. 3-22	Washington	District of Columbia
Apr. 25-29	Niagara Falls	New York
May 1-5	Kitchener	Ontario
May 7-8	Utica	New York
May 10-12	Binghamton	New York
May 14-27	Boston	Massachusetts
May 29-June 2	Providence	Rhode Island
June 6-9	Nashville	Tennessee
June 11-12	Little Rock	Arkansas
June 14-16	Tulsa	Oklahoma
June 18-19	Jackson	Mississippi
June 21-23	Lake Charles	Louisiana
June 25-30	Dallas	Texas
July 1-2	Fort Worth	Texas
July 5-7	El Paso	Texas
July 9-16	Houston	Texas
July 18-21	San Antonio	Texas
July 23-24	Monroe	Louisiana
July 26-28	Memphis	Tennessee
July 31-Aug. 4	Kansas City	Missouri
Aug. 7-11	Des Moines	Iowa
Aug. 13-14	Waterloo	Iowa
Aug. 16-18	Omaha	Nebraska
Aug. 21-26	Salt Lake City	Utah
Aug. 29-30	Sioux Falls	South Dakota
Sept. 3-4	Green Bay	Wisconsin
Sept. 6-8	Milwaukee	Wisconsin
Sept. 11-15	Bloomington	Minnesota

1974 SEASON

RED UNIT (continued)

Date	Town	State
Sept. 18-22	Cincinnati	Ohio
Sept. 24-29	Columbus	Ohio
Oct. 1-6	Indianapolis	Indiana
Oct. 8-9	Bloomington	Indiana
Oct. 11-13	Champaign	Iillinois
Oct. 16-27	Detroit	Michigan
Oct. 29-Nov. 3	Pittsburgh	Pennsylvania
Nov. 6-17	Cleveland	Ohio

1974 SEASON

BLUE UNIT

Jan. 4-6	Venice	Florida
Jan. 8-13	St. Petersburg	Florida
Jan. 14-16	TV Taping, St. Petersburg	Florida
Jan. 18-22	West Palm Beach	Florida
Jan. 23-29	Miami Beach	Florida
Jan. 31-Feb. 3	Jacksonville	Florida
Feb. 5-10	Greensboro	North Carolina
Feb. 12-13	Fayetteville	North Carolina
Feb. 15-18	Hampton	Virginia
Feb. 20-24	Norfolk	Virginia
Feb. 26-Mar. 3	Raleigh	North Carolina
Mar. 5-10	Richmond	Virginia
Mar. 12-25	Baltimore	Maryland
Mar. 28-May 27	New York City	New York
May 29-June 16	Philadelphia	Pennsylvania
June 20-24	Oklahoma City	Oklahoma
June 27-30	Tucson	Arizona
July 2-7	Phoenix	Arizona
July 9-14	San Diego	California
July 16-31	Inglewood	California
Aug. 1-13	Anaheim	California
Aug. 15-18	Long Beach	California

1974 SEASON

BLUE UNIT (continued)

Date	Town	State
Aug. 21-26	Oakland	California
Aug. 28-Sept. 2	San Francisco	California
Sept. 4-8	Fresno	California
Sept. 11-16	Seattle	Washington
Sept. 18-22	Portland	Oregon
Sept. 25-29	Denver	Colorado
Oct. 2-21	Chicago	Illinois
Oct. 24-27	Ottawa	Ontario
Oct. 29-Nov. 3	Quebec City	Quebec
Nov. 6-17	Nassau, L.I.	New York
Nov. 20-24	Springfield	Massachusetts
Nov. 26-Dec. 1	New Haven	Connecticut

1975 SEASON

RED UNIT

Jan. 3-5	Venice	Florida
Jan. 7-12	St. Petersburg	Florida
Jan. 13-15	TV Taping, St. Petersburg	Florida
Jan. 17-21	West Palm Beach	Florida
Jan. 22-28	Miami Beach	Florida
Jan. 30-Feb. 2	Jacksonville	Florida
Feb. 5-9	Greensboro	North Carolina
Feb. 11-16	Norfolk	Virginia
Feb. 18-23	Richmond	Virginia
Feb. 25-Mar. 2	Raleigh	North Carolina
Mar. 4-5	Fayetteville	North Carolina
Mar. 7-9	Asheville	North Carolina
Mar. 12-23	Baltimore	Maryland
Mar. 25-May 26	New York	New York
May 28-June 8	Philadelphia	Pennsylvania
June 12-15	Huntsville	Alabama
June 18-22	Oklahoma City	Oklahoma
June 25-29	Tucson	Arizona
July 1-6	Phoenix	Arizona

1975 SEASON

RED UNIT (continued)

Date	Town	State
July 8-13	San Diego	California
July 15-30	Inglewood	California
July 31-Aug. 12	Anaheim	California
Aug. 14-17	Long Beach	California
Aug. 19-25	Oakland	California
Aug. 27-Sept. 1	San Francisco	California
Sept. 3-7	Fresno	California
Sept. 10-14	Seattle	Washington
Sept. 16-17	Spokane	Washington
Sept. 19-21	Portland	Oregon
Sept. 24-28	Denver	Colorado
Oct. 1-27	Chicago	Illinois
Oct. 29-Nov. 2	Pittsburgh	Pennsylvania
Nov. 5-16	Nassau, L.I.	New York
Nov. 19-23	Springfield	Massachusetts
Nov. 25-30	New Haven	Connecticut

1975 SEASON

BLUE UNIT

Feb. 3-5	Venice	Florida
Feb. 7-9	Lakeland	Florida
Feb. 12-23	Atlanta	Georgia
Feb. 25-Mar. 2	Charlotte	North Carolina
Mar. 4-5	Savannah	Georgia
Mar. 7-9	Columbia	South Carolina
Mar. 12-16	Knoxville	Tennessee
Mar. 19-Apr. 6	Washington	District of Columbia
Apr. 10-13	Charleston	West Virginia
Apr. 16-20	Binghamton	New York
Apr. 23-27	Niagara Falls	New York
Apr. 29-May 4	Rochester	New York
May 6-11	Hartford	Connecticut
May 13-26	Boston	Massachusetts
May 28-June 1	Providence	Rhode Island
June 5-8	Terre Haute	Indiana

1975 SEASON

BLUE UNIT (continued)

Date	Town	State
June 10-11	Evansville	Indiana
June 13-15	Memphis	Tennessee
June 17-18	Little Rock	Arkansas
June 20-22	Tulsa	Oklahoma
June 24-29	Dallas	Texas
June 30-July 1	Fort Worth	Texas
July 3-6	San Antonio	Texas
July 8-16	Houston	Texas
July 18-20	Monroe	Louisiana
July 22-23	Jackson	Mississippi
July 25-27	Louisville	Kentucky
July 30-Aug. 3	Des Moines	Iowa
Aug. 5-10	Bloomington	Minnesota
Aug. 12-13	Waterloo	Iowa
Aug. 15-17	Omaha	Nebraska
Aug. 20-25	Salt Lake City	Utah
Aug. 28-Sept. 1	Kansas City	Missouri
Sept. 3-7	St. Louis	Missouri
Sept. 11-14	New Orleans	Louisiana
Sept. 17-21	Indianapolis	Indiana
Sept. 23-Oct. 5	Detroit	Michigan
Oct. 8-19	Largo	Maryland
Oct. 22-26	Nashville	Tennessee
Oct. 28-29	Carbondale	Illinois
Oct. 31-Nov. 2	Champaign	Illinois
Nov. 5-16	Cleveland	Ohio

1976 SEASON

RED UNIT

Feb. 9-11	Venice	Florida
Feb. 13-15	Lakeland	Florida
Feb. 18-29	Atlanta	Georgia
Mar. 2-7	Charlotte	North Carolina
Mar. 9-10	Savannah	Georgia
Mar. 12-14	Columbia	South Carolina
Mar. 16-21	Knoxville	Tennessee

1976 SEASON

RED UNIT

Date	Town	State
Mar. 24-28	Cincinnati	Ohio
Mar. 31-Apr. 4	Charleston	West Virginia
Apr. 6-25	Washington	District of Columbia
Apr. 29-May 2	Niagara Falls	New York
May 4-9	Binghamton	New York
May 11-16	Rochester	New York
May 18-23	Hartford	Connecticut
May 25-30	Troy	New York
June 1-6	Providence	Rhode Island
June 10-13	Louisville	Kentucky
June 15-16	Memphis	Tennessee
June 18-20	Mobile	Alabama
June 22-27	New Orleans	Louisiana
June 30-July 4	Pine Bluff	Arkansas
July 7-18	Houston	Texas
July 20-25	Dallas	Texas
July 27-Aug. 1	San Antonio	Texas
Aug. 3-4	Abilene	Texas
Aug. 6-8	Lubbock	Texas
Aug. 10-11	Amarillo	Texas
Aug. 13-15	Albuquerque	New Mexico
Aug. 18-23	Salt Lake City	Utah
Aug. 26-29	Bloomington	Minnesota
Sept. 1-6	St. Louis	Missouri
Sept. 9-12	Ft. Wayne	Indiana
Sept. 14-19	Indianapolis	Indiana
Sept. 21-Oct. 3	Detroit	Michigan
Oct. 6-17	Largo	Maryland
Oct. 20-Nov. 1	Boston	Massachusetts
Nov. 4-7	Pittsburgh	Pennsylvania
Nov. 9-21	Cleveland	Ohio

1976 SEASON

BLUE UNIT

Date	Town	State
Jan. 2-4	Venice	Florida
Jan. 6-11	St. Petersburg	Florida
Jan. 12-14	TV Taping St. Petersburg	Florida
Jan. 16-20	West Palm Beach	Florida
Jan. 21-27	Miami Beach	Florida
Jan. 29-Feb. 2	Hollywood	Florida
Feb. 5-8	Jacksonville	Florida
Feb. 10-15	Greensboro	North Carolina
Feb. 17-22	Raleigh	North Carolina
Feb. 24-25	Fayetteville	North Carolina
Feb. 27-29	Asheville	North Carolina
Mar. 2-7	Norfolk	Virginia
Mar. 9-14	Richmond	Virginia
Mar. 16-29	Baltimore	Maryland
Apr. 1-May 31	New York City	New York
June 2-13	Philadelphia	Pennsylvania
June 17-20	Huntsville	Alabama
June 23-27	Oklahoma City	Oklahoma
June 30-July 4	Tucson	Arizona
July 6-11	Phoenix	Arizona
July 13-18	San Diego	California
July 20-Aug. 4	Inglewood	California
Aug. 5-17	Anaheim	California
Aug. 18-22	Long Beach	California
Aug. 24-30	Oakland	California
Sept. 1-6	San Francisco	California
Sept. 8-12	Fresno	California
Sept. 15-19	Seattle	Washington
Sept. 21-22	Spokane	Washington
Sept. 24-26	Billings	Montana
Sept. 29-Oct. 3	Denver	Colorado
Oct. 6-Nov. 7	Chicago	Illinois
Nov. 10-21	Nassau, L.I.	New York
Nov. 24-28	New Haven	Connecticut
Nov. 30-Dec. 5	Springfield	Massachusetts

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR SARASOTA COUNTY CIVIL ACTION

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., a Delaware corporation,

Plaintiff,

vs.

JOHN W. MIKOS, as Tax Assessor of Sarasota County, Florida and J. ED STRAUGHN, as Executive Director of the Department of Revenue of the State of Florida,

Defendants.

Case No: 72-1806

SECOND AMENDED COMPLAINT

Plaintiff, RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., a Delaware corporation (hereinafter referred to as Ringling Bros.), sues Defendants JOHN W. MIKOS, as Tax Assessor of Sarasota County, Florida (hereinafter referred to as Mikos) and J. ED STRAUGHN, as Executive Director of the Department of Revenue of the State of Florida (hereinafter referred to as Straughn) and for its second amended complaint alleges:

COUNT I.

1. The plaintiff, Ringling Bros., is a foreign corporation duly organized, domiciled and existing under and by virtue of the laws of the State of Delaware, and is duly authorized and qualified to do business in the State of Florida, pursuant to Chapter 613 of the Florida Statutes. It maintains, and has since 1967 maintained its principal place of business at 1015 18th

Street, N.W., Washington, D.C., containing 12,000 square feet of office space. Said office houses the permanent executive and administrative staff of 40 persons and the principal operating and corporate officers of Ringling Bros. The entire circus operation is coordinated and controlled from said office.

2. (a) The Defendant Mikos is sued herein in his official capacity and is the duly qualified Tax Assessor of Sarasota County, Florida, and as such assesses tangible personal property within Sarasota County for the purposes of the tangible personal property tax imposed by the Florida Statutes.

(b) The Defendant Straughn is sued herein in his official capacity as Executive Director of the Department of Revenue of the State of Florida and has the overall responsibility for supervising and collecting the tangible personal property tax and is made a party hereto pursuant to the provisions of Section 194.181(5) of the Florida Statutes.

3. This action is filed in accordance with Section 194.171 of the Florida Statutes in the county wherein said property was located.

4. On or about August 10, 1972, Defendant Mikos informed Ringling Bros. that he had made a tangible personal property tax assessment of $1,371,440.00, plus penalties, on Ringling Bros.' property for the 1972 tax year.

5. For the year 1971, Defendant Mikos had made tangible personal property tax assessments which were practically indentical [*sic*] to the 1972 assessment described in paragraph 4 above. Ringling Bros. had filed a petition with the Board of Tax Adjustment of Sarasota County (the "Board") objecting to the assessments, and after a hearing on August 2, 1971, the Board had rejected defendant Mikos' assessments and had determined that the tangible personal property tax assessment on Ringling Bros.' property should have been based on the number of days that the property was actually present in Florida. Therefore, the Plaintiff had prepared its 1972 tax return in accordance with the Board's decision in 1971.

6. On or about August 23, 1972, Ringling Bros. filed a petition (the "1972 Petition") with the Board. The 1972 Petition (annexed hereto as Exhibit A) objected to the assessments and imposition of penalties by Defendant Mikos.

7. Plaintiff exhausted its administrative remedy as hearings were held on the Petition by the Board on September 6, 1972, and September 8, 1972.

8. Section 194.032(5) of the Florida Statutes and Rule 12B-1.130(4) of the Rules and Regulations of the Department of Revenue (the "Regulations") require the Board to notify the taxpayer in writing of the decision of the Board within twenty calendar days of the last day the Board is in session, which on information and belief, was on or about September 8, 1972. No such notification has been received by the Plaintiff as of the date hereof; however, the Plaintiff has received a notification a copy of which has been filed with the Court, from R. H. Hackney, Jr., Clerk of the Board, to the effect that there is no written decision of the Board on Plaintiff's 1972 Petition. The notification further states that the only written record concerning Plaintiff's 1972 petition is the minutes of the Board's hearings, which are annexed to the notification.

9. On October 30, 1972, Ringling Bros. received tangible personal property tax bills for 1972 from the Tax Collector of Sarasota County, Miss Charlie Hagerman ("Hagerman"). The bills, annexed hereto as Exhibit B, reflect a total assessment of $878,660.00 on Ringling Bros.' property.

10. On November 3, 1972, Ringling Bros., pursuant to Section 194.171(3) of the Florida Statutes, paid to Hagerman $772.44, of which $643.70 represents the amount of tax which it admits in good faith to be owing, and $128.74 the penalty for late filing which was paid under protest. A copy of Hagerman's receipt for such payment is annexed hereto as Exhibit C.

11. Of the total assessment of $878,660.00 as reflected in the tax bills (Exhibit B), $19,600.00 represents the assessed value of certain equipment and animals which Plaintiff admits

to be permanently located in Venice, Florida (the "Venice Property") and subject to the tangible personal property tax and concerning which there is no dispute between the parties, and which was paid as alleged in paragraph 10.

12. Of the total assessment, the remainder of $859,060.00 is the subject of the dispute in this proceeding; it represents the assessed value, attributed to the circus animals, railroad cars, railroad rolling stock and circus equipment (hereinafter the "Equipment") which are transported and used directly in conjunction with the presentation of the two separate traveling circus shows owned and operated by Ringling Bros. The shows are respectively designated the "Red" and "Blue" Units.

13. Ringling Bros. stages its circuses across the breadth of the United States and Canada exclusively indoors in arenas or auditoriums. Plaintiff enters into contracts or leases with the owners or operators of various arenas for the dates during which each show will be played. The contracts or leases are made well in advance of each season, so that each Unit may have a two-year operating schedule. Each Unit stages two or three shows per day during the tour, except during those days when the circus is traveling. The shows include a variety of traditional circus acts and several production number extravanganza. Forty to fifty acts are presented in each circus performance. Of the 274 performers comprising the circus cast, approximately 130 are citizens of foreign countries, principally European. In 1972, the Red and Blue Units combined played in 38 states, including Florida, and several Canadian Provinces as demonstrated by the 1972 itineraries for the circuses annexed hereto as Exhibits D and E. During the 1972 tour, an aggragate [*sic*] of 992 performances were given by both Units. Of the total number of performances, 68 or approximately 6.8% of all performances were given in the State of Florida and 12 or approximately 1% in Sarasota County. In 1972, the Units presented a greater number of performances in several states including, in the case of the Blue Unit, 103 performances in each of New York and California, respectively. Of the gross

receipts of Ringling Bros. derived from the foregoing performances of the two Units, approximately 5.5% has received from the performances in the State of Florida which includes 0.81% from the performances in Sarasota County.

14. During the 1972 tours, the Blue Unit spent 62 days in Florida of which 34 days (approximately 9% of the year) were in Sarasota County. The Red Unit spent 84 days in Florida of which 44 days (approximately 12% of the year) were in Sarasota County. The longest single engagement for 1972 was at Madison Square Gardens [*sic*], New York, New York where the Blue Unit played 63 days.

15. After each engagement, the Equipment is transported by company-owned trains to the next engagement. Ringling Bros. presently operates two trains, one for each Unit. Of the Defendant, Mikos, [*sic*] total assessments of $1,337,440.00, $854,132.00 or approximately 64%, represents the assessed value of these trains. Ringling Bros. enters into agreements annually with a number of interestate [*sic*] common carriers by railroad which agreed to move the circus trains from location to location. These common carriers furnished engines, cabooses and crews and coordinate the scheduling and logistical work with a representative of Ringling Bros. During 1972, the trains traveled a total of 38,551 miles on routes in the United States and Canada. Of such total mileage, 1,762 miles, or approximately 4% were traveled in the State of Florida.

16. All of the Equipment was brought to and depart [*sic*] from Sarasota County on the aforesaid train on pre-established, definite dates in accordance with the itineraries for each Unit. As with all other engagements, a majority of the performers lived on the trains while in Sarasota County. After the trains leave Sarasota County, the only property which remains in Sarasota County is the Venice Property. The only activities which are conducted in Sarasota County after the departure of the trains are maintenance and caretaking activities which are performed by one or two caretakers who live in the Venice area.

17. The activities which are conducted in Sarasota County while the Units are present, include maintaining and refurbishing Equipment, the presentation of an aggregate of 12 performances in the Venice arena and rehearsals.

18. On information and belief, the assessments for the year 1972 were purportedly made pursuant to Sections 192.011 and 192.032(2) of the Florida Statutes because the tangible personal property was physically present in Sarasota County and the State of Florida on January 1, 1972, the assessment date, pursuant to the itinerary for each Unit.

19. Section 192.011 of the Florida Statutes provides in pertinent part that "the assessor shall assess all property located within this county" and Section 192.032(2) of the Florida Statutes provides in pertinent part with regard to the basis of such assessment that:

> "All property shall be assessed according to its situs as follows:
>
> * * *
>
> (2) Tangible personal property (a) in that county. . . in which it is *permanently located* on January 1 of each year. Property brought into the state after January 1 and before April 1 of any year shall be considered to have been in the state on January 1, of that year; except that tangible personal property brought into the state after January 1 and before April 1 of any year shall be taxable for that year only if the assessor has reason to believe that such property will be removed from the state prior to January 1 of the next succeeding year." (emphasis added)

20. The facts alleged in paragraphs 13 through 17 hereof and in the 1972 itineraries for the circus annexed hereto as Exhibits D and E, demonstrate that all of the Equipment is continuously engaged in interstate commerce and is within Sarasota County and the State of Florida temporarily, for a specific, limited period.

21. All of the Equipment assessed by Defendant, Mikos, was in Sarasota County and the State of Florida on a temporary and transient basis on the assessment date, and was not "permanently located" within the meaning of Section 192.032(2) of the Florida Statutes in Sarasota County or the State of Florida at any time.

22. Plaintiff alleges that the assessments of the Equipment was [*sic*] improper and void under Section 192.032(2) of the Florida Statutes and is [*sic*] inconsistent with the 1971 decision of the Board because of [*sic*] the Equipment was continuously engaged in interstate commerce and was not "permanently located" in Sarasota County or the State of Florida on the assessment date as required by Section 192.032(2) of the Florida Statutes.

23. In accordance with the provisions of the interstate commerce and due process clauses contained in Article I, Section 8 and Section 1 of Amendment XIV of the Constitution of the United States the only state which may tax tangible property which is continuously engaged in interstate commerce at its full unapportioned value, such as the Equipment in this case, is the State of Plaintiff's domicile.

24. Ringling Bros. pays taxes to 39 states, including Florida, the District of Columbia, and five Canadian Provinces. In 35 of the these states and Canadian Provinces, such taxes are based on the value of the Equipment which is the subject of this action, under Statutes in such jurisdictions providing for an apportionment formula determined in part by the number of days the Equipment is used in the state or province.

25. Assuming the Equipment was "permanently located" within Sarasota County and the State of Florida on the assessment date and taxable at 100% of its assessed value in accordance with the provision of Sections 192.011 and 192.032(2) of the Florida Statutes, the assessment of Defendant, Mikos, as revised by the Board, is nevertheless improper and void and constitutes an undue burden upon interstate commerce and a violation of due process under Article I,

Section 8 and Section 1 of Amendment XIV of the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida because Sarasota County and the State of Florida, as a non-domiciliary state, may legally tax the Equipment only on a fair apportionment of value based on the value of the property habitually employed in the state, determined by the average number of days the Equipment is physically present in the county or state or the average number of track miles traveled by the circus trains in Sarasota County and the State of Florida.

26. Assuming the provisions of Section 192.0ll and 192.032 (2) of the Florida Statutes required the Defendant Mikos to assess the Equipment physically located in Sarasota County and the State of Florida on the assessment date, at 100% of its assessed value, such Statutes are void and unconstitutional as applied to the Equipment herein under the interstate and due process clauses of Article I, Section 8 and Section 1 of Amendment XIV of the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida.

27. Ringling Bros. has retained the law firm of Crabtree, Butler, Syprett, Meshad & Seay to represent them in the presentation of this lawsuit, and has assumed the obligation to pay a reasonable attorney's fee for the services to be rendered herein.

WHEREFORE, the Plaintiff prays this Court will enter a final Order:

(a) Adjudging that the assessment of the Defendant Mikos violates the provisions of Section 192.032(2) of the Florida Statutes in that the tangible personal property assessed was not "permanently located" in Sarasota County, Florida and is therefore null and void; and/or in the alternative,

(b) Adjudging that the assessment of Defendant, Mikos, is improper and void in that it constitutes an undue burden upon interstate commerce and it violates the commerce and due process clauses contained in Article I, Section 8 and Section 1 of Amendment XIV of the Constitution of the United States and in Article I, Section 9 of the Constitution of the State of Florida in that Sarasota County and the State of Florida may constitutionally tax the Equipment based on the value of the property habitually employed in the state, determined by the average number of days the Equipment is physically present in the State or the average number of track miles traveled by the circus trains in Sarasota County and the State of Florida, and/or in the alternative,

(c) Adjudging that Chapters 192, 193 and 194 of the Florida Statutes on their face and as applied exceed the taxing power of the State of Florida and deprive Plaintiff of its property without due process of law, in violation of Article I, Section 8 and Section 1 of Amendment XIV of the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida and that the assessments made pursuant to Chapters 192, 193 and 194 are void and illegal; and

(d) Adjudging that Chapters 192, 193 and 194 of the Florida Statutes on their face and as applied constitute an undue burden upon interstate commerce and discriminate against interstate and foreign commerce in contravention of Article I, Section 8 of the Constitution of the United States and that the assessments made pursuant to Chapters 192, 193 and 194 are void and illegal, and

(e) Enjoining and restraining Defendant, and each and every one of them and their officers, employees and agents, both during the pendency of this action and permanently, from enforcing and implementing the aforesaid assessments and collecting any taxes thereunder;

(f) Assessing a reasonable attorney's fee against the Defendants collectively or individually, plus costs;

(g) For such other and further relief as to this Court may seem just and proper.

COUNT II.

28. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 27 hereof with the same force and effect as if fully set forth herein.

29. Assuming the Equipment was "permanently located" as determined under the Florida Statutes within Sarasota County and the State of Florida on January 1, 1972, the assessment of Defendant Mikos, as revised by the Board, was nevertheless improper and void because the assessor failed to arrive at a just valuation of the Equipment as required by Section 193.011 of the Florida Statutes and Rule 12B-1.103 (1) of the Regulations.

30. Section 193.011 of the Florida Statutes and Rule 12B-1.103(1) of the Regulations provide that in arriving at a just valuation of property the assessor shall take into consideration the following factors:

> (1) The present cash value of the property; (2) The highest and best use to which the property can be expected to be put in the immediate future and the present use of the property; (3) The location of said property; (4) The quantity or size of said property; (5) The cost of said property and the present replacement value of any improvements thereon; (6) The condition of said property; (7) The income from said property; and (8) The net proceeds of the sale of the property, as received by the seller, after deduction of all of the usual and reasonable fees and costs of the sale, including the costs and expenses of financing.

31. The method of assessment used by Defendant Mikos was unrealistic and arbitrary, and was productive of a valuation

which bears no reasonable relationship to the just value of the Equipment. The following are among the specific reasons that the assessment was improper:

(a) The Equipment was assessed in an amount substantially in excess of its just value in violation of Section 193.011 of the Florida Statutes and Rule 12B-1.103(1) of the Regulations;

(b) The assessment violated the provisions of Section 193.011 of the Florida Statutes and Rule 12B-1.103(1) of the Regulations because Defendant Mikos failed to consider the income from the Equipment in arriving at his valuation as required by Section 193.011 and Rules 12B-1.103(1) and 12B-1.106 of the Regulations;

(c) The assessment of Defendant Mikos was arbitrary and improper and violated the provisions of Section 193.011 of the Florida Statutes and Rule 12B-1.103(1) of the Regulations because Defendant Mikos failed to consider the following criteria of Section 193.011 and Rule 12B-1.103(1): (i) the highest and best use to which the property can be expected to be put in the immediate future and the present use of the property and (ii) the location of said property; or in the alternative,

(d) If Defendant Mikos did give consideration to such criteria, he failed to properly apply such criteria as required by Section 193.011 of the Florida Statutes and Rule 12B-1.103(1) of the Regulations.

32. Plaintiff respectfully requests that the Court adjudge and declare that its property was not valued in accordance with Section 193.011 of the Florida Statutes and Rules 12B-1.103(1) and 12B-1.106 of the Regulations and that the failure of Defendant Mikos to assess the value of its properties in accordance with the provisions of Section 193.011 of the Florida Statutes and Rules 12B-1.103(1) and 12B-1.106 of the Regulations, as aforesaid, was illegal and improper and violates [*sic*] Plaintiff's rights to due process and equal protection guaranteed by the Fourteenth Amendment to the Constitution

of the United States and its rights to due process secured by Article I, Section 9 of the Constitution of the State of Florida and that the assessment was, therefore, improper and void.

33. By reason of the above-described application of the Florida Statutes by Defendant Mikos, Plaintiff will be forced to pay substantial taxes that are not properly owing, the payment of which will adversely affect the conduct of Plaintiff's business. Plaintiff may also be subject to severe penalties if it fails to comply with Defendant Mikos' erroneous application of the Florida Statutes.

WHEREFORE, Plaintiff prays this Court will enter a final Order:

(a) Adjudging and declaring that Defendant Mikos failed to properly assess the value of Plaintiff's property as required by Section 193.011 of the Florida Statutes and Rules 12B-1.103(1) and 12B-1.106 of the Regulations and that the assessment was, therefore, improper and void; and to direct Defendant Mikos to reassess said property applying said principles; or

(b) Adjudging and declaring that the assessment of Defendant Mikos violates Plaintiff's rights to due process and equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States and its rights to due process secured by Article I, Section 9 of the Constitution of the State of Florida, and that the assessment was, therefore, improper and void.

(c) Enjoining and restraining Defendants, and each and every one of them and their officers, employees and agents, both during the pendency of this action and permanently, from enforcing and implementing the aforesaid assessments and collecting any taxes thereunder;

(d) Assessing a reasonable attorney's fee against the Defendant collectively or individually, plus costs;

(e) For such other and further relief as to the Court may deem just and proper.

IN THE SECOND DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

JOHN W. MIKOS, etc., et al.,
Appellants,

vs.

RINGLING BROS.-BARNUM & BAILEY
COMBINED SHOWS, INC., etc.
Appellee.

Appeal No. 78-316

BRIEF OF APPELLEE

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(A) Ringling's Tour and Railroad Property May Only Be Taxed On a Fair, Apportioned Basis.

In the series of Supreme Court cases upon which the Circuit Court relied in determining that Ringling's Tour and Railroad Property must be taxed on an apportioned basis, specifically, *Johnson Oil Ref. Co.* v. *Oklahoma,* 290 U.S. 158

(1933) and its progeny, the United States Supreme Court developed certain principles regarding the taxation of movable tangible property, such as the Tour and Railroad Property.

These principles were summarized succinctly by the United States Court of Appeals for the District of Columbia in *Smoot Sand & Gravel Corp.* v. *District of Columbia,* 174 F. 2d 505 (D.C. Cir. 1949), *cert. denied,* 337 U.S. 939 (1949) at page 506:

> ". . . If property is located within one State throughout a taxable year, it can be taxed in that state. But the doctrine of 'permanent situs' does not apply to tangibles which are in one state only part of the time, particularly where they are in the taxing state a minority of the time.
>
> If tangible property moves in interstate commerce and is in one state part of the time and in other states (none being the state of domicile) part of the time, it cannot be constitutionally taxed at full value in any one of those states. In order to be constitutional, a property tax on such tangibles must be apportioned upon some fair basis. This has been the consistent holding of the Supreme Court."

Thus, while the state of domicile may tax a taxpayer's tangible personal property at full value when no tax situs has been established for the property outside of the domicile, where movable personal property acquires a situs sufficient to satisfy constitutional requirements for taxation in a nondomiciliary state, the nondomiciliary jurisdiction may not tax the movable property at full value. It may only tax on a fair, apportioned basis.

Supreme Court, U. S.
FILED
FEB 22 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1143

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellant,

v.

JOHN W. MIKOS, as Property Appraiser of Sarasota County, Florida, and RANDY MILLER, as Executive Director of the Department of Revenue of the State of Florida,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA IN AND FOR THE SECOND DISTRICT

APPELLEES' MOTION TO DISMISS

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TABLE OF CONTENTS

Page

MOTION TO DISMISS 1

ARGUMENT:

I. The Federal Questions Sought To Be Reviewed, Though Appellees Assert the Non-Existence of Any Substantial Federal Questions, Were Neither Timely Nor Properly Raised, Nor Expressly Passed Upon; and the Judgment of the Florida Court Rests Upon an Adequate Non-federal Basis 2

II. The Appeal Does Not Present a Substantial Federal Question 5

III. The Appeal Requests Review by the Supreme Court of the United States of Questions Previously Answered by This Court in Many Other Decisions 7

CONCLUSION 10

APPELLEES' APPENDICES:

A. Appellant's Points in Brief on Appeal in the District Court of Appeal of the State of Florida in and for the Second District A.A.1a

B. Appellant's Points in Reply Brief on Cross-Appeal in the District Court of Appeal of the State of Florida in and for the Second District A.A.3a

C. Appellant's Points in Jurisdictional Brief to the Supreme Court of the State of Florida A.A.5a

TABLE OF AUTHORITIES

Cases: Page

Bacon v. Illinois, 227 U.S. 504, 57 L. Ed. 615 . . . . . 6, 8

Braniff Airways, Inc. v. Nebraska, 347 U.S. 590, 98 L. Ed. 967 7

Brown v. Houston, 114 U.S. 622, 29 L. Ed. 257 . . . . . 4, 6, 8

Central Railroad Co. of Pennsylvania v. Commonwealth of Pennsylvania, 370 U.S. 607, 8 L. Ed. 2d 720, *rehearing denied*, 371 U.S. 856, 9 L. Ed. 2d 93 8

Cases, continued:

Charleston Fed. Sav. & L. Asso. v. Alderson, 324 U.S. 182, 89 L. Ed. 857 2

Coe v. Errol, 116 U.S. 517, 29 L. Ed. 715 . . . . . 4, 6, 8

Diamond Match Company v. Village of Ontonagon, 188 U.S. 82, 47 L. Ed. 394 . . . . . 4, 8

General Motors Corp. v. Washington, 377 U.S. 436, 12 L. Ed. 2d 430 . . . . . 8, 9

Heisler v. Thomas Colliery Co., 260 U.S. 245, 67 L. Ed. 237 . . . . . 4, 6, 8

Hope Natural Gas Co. v. Hall, 274 U.S. 284, 71 L. Ed. 1049 4

Ice Capades Inc. v. County of Los Angeles, 56 Cal. App. 3d 745, 128 Cal. Rptr. 717 4

Kelley v. Rhoads, 188 U.S. 1, 47 L. Ed. 359 . . . . . 4, 8

McGoldrick v. Berwind-White Coal Min. Co., 309 U.S. 33, 84 L. Ed. 565 . . . . . 4, 6, 8

Michelin Tire Corp. v. Wages, 423 U.S. 276, 46 L. Ed. 2d 495, *rehearing denied*, 424 U.S. 935, 47 L. Ed. 2d 344 8

Minnesota v. Blasius, 290 U.S. 1, 78 L. Ed. 131 . . . . . 4, 6, 8

Northwest Airlines v. Minnesota, 322 U.S. 292, 88 L. Ed. 1283 . . . . . 7, 8

Norton Co. v. Department of Revenue, 340 U.S. 534, 95 L. Ed. 517 9

Pittsburg & S. Cole Co. v. Bates, 156 U.S. 577, 39 L. Ed. 538 6

Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 35 L. Ed. 613 7

Scripto v. Carson, 362 U.S. 207, 4 L. Ed. 2d 660 8

United Airlines v. Mahin, 410 U.S. 623, 35 L. Ed. 2d 545 8

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 82 L. Ed. 823 8

Cases, continued: Page

Wilson v. Loews, Inc., 355 U.S. 597, 2 L. Ed. 519 9

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 53 L. Ed. 2d 965 9

Constitutional Provisions:

Constitution of the United States:

Article I, Section 8 . . . . . 3, 7, 8

Fourteenth Amendment 7

Rules:

United States Supreme Court Rule 16(1)(b)(d) 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1143

RINGLING BROS.-BARNUM & BAILEY
COMBINED SHOWS, INC.,

Appellant,

v.

JOHN W. MIKOS, as Property Appraiser
of Sarasota County, Florida, and
RANDY MILLER, as Executive Director
of the Department of Revenue of
the State of Florida,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF
APPEAL OF THE STATE OF FLORIDA IN
AND FOR THE SECOND DISTRICT

APPELLEES' MOTION TO DISMISS

Appellees move, pursuant to Rule 16, § 1(b) and § 1(d) of the Revised Rules of the Supreme Court of the United States, to dismiss the appeal herein upon the grounds that:

(1) The federal questions sought to be reviewed, although Appellees assert the non-existence of any

substantial federal questions, were neither timely nor properly raised, nor expressly passed upon; and the judgment of the Florida court rests upon an adequate non-federal basis;

(2) The appeal does not present a substantial federal question; and

(3) The appeal requests review by the Supreme Court of the United States of questions previously answered by this court in many other decisions.

ARGUMENT

I.

THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED, THOUGH APPELLEES ASSERT THE NON-EXISTENCE OF ANY SUBSTANTIAL FEDERAL QUESTIONS, WERE NEITHER TIMELY NOR PROPERLY RAISED, NOR EXPRESSLY PASSED UPON; AND THE JUDGMENT OF THE FLORIDA COURT RESTS UPON AN ADEQUATE NON-FEDERAL BASIS.

While Appellant attempted to challenge the validity of the statute in its complaint,[1] it thereafter failed to preserve this question.

This court's jurisdiction requires:

> [T]hat there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the Federal Constitution, treaties or laws. *Charleston Fed. Sav. & L. Assoc. v. Alderson,* 324 U.S. 182, at p. 185, 89 L. Ed. 857, at p. 860.

The judgment of the trial court[2] neither struck down nor upheld the validity of any state statute, but

[1] (A. 44a)

[2] (A. 13a)

erroneously carved out its own apportionment formula, suggesting that this was required under the Commerce Clause of the Federal Constitution (Article 1, Section 8). The trial court thus avoided the constitutional challenge, and in effect attempted to write its own taxing statute.

Appellant failed to challenge the validity of the statute in its appeal to the Florida District Court of Appeal. Appellant's Points on Appeal,[3] in all briefs there submitted, merely sought to establish a partial exemption from taxation, by urging an apportionment formula. Even in their cross appeal they did not urge the District Court to declare the statute repugnant to the Federal Constitution either on its face, or as applied.[4]

The District Court of Appeal of Florida, Second District, decided two issues: (1) the interpretation of the phrase "permanently located" as contained in the statute; and, (2) whether the property was taxable at full value.

As to the former, it found, as a matter of fact, that the nature of the property and the purpose of its stay in Sarasota County afforded a tax situs. As to the latter, since the property was not in the stream of commerce on the taxing date, it should be treated as any other movable property, and was taxable at one hundred percent of its value.[5]

The court found it unnecessary to construe the validity of the statute, since it determined that the property was not in interstate commerce on the taxing date.

[3] [Appellees' Appendix (A.A. 1a)]

[4] It is significant that Appellant moved before the Florida Supreme Court that the trial court judgment *did not* construe the validity of any Statute (A.A. 3a).

[5] (A. 1a)

Substantial authority exists for such ruling: *Brown v. Houston,* 114 U.S. 622, 29 L. Ed. 257; *Coe v. Errol,* 116 U.S. 517, 29 L. Ed. 715; *Kelley v. Rhoads,* 188 U.S. 1, 47 L. Ed. 359; *Diamond Match Company v. Village of Ontonagon,* 188 U.S. 82, 47 L. Ed. 394; *Heisler v. Thomas Colliery Co.,* 260 U.S. 245, 67 L. Ed. 237; *Hope Natural Gas Co. v. Hall,* 274 U.S. 284, 71 L. Ed. 1049; *Minnesota v. Blasius,* 290 U.S. 1, 78 L. Ed. 131; *McGoldrick v. Berwind-White Coal Min. Co.,* 309 U.S. 33, 84 L. Ed. 565.

Appellant sought certiorari and appeal to the Florida Supreme Court. Appellant attempted to invoke that court's jurisdiction, claiming that it had continuously raised, and the District Court of Appeal had decided, the validity of the taxing statute.[6] The Florida Supreme Court found none of these assertions to be accurate, and accordingly dismissed the appeal and denied certiorari.[7]

Appellant, in its jurisdictional statement (page 13) suggests that this court has jurisdiction herein because of an apparent conflict between a decision of a California court in the case of *Ice Capades, Inc. v. County of Los Angeles,* 56 Cal. App. 3d 745, 128 Cal. Rptr. 717, and the Florida courts in the within case. The distinctions between the two cases are vivid[8] and there is no

[6](A.A. 3a, *supra*)

[7](A. 16a)

[8]The California court in *Ice Capades* established tax situs liability of the property based on its stay in California and travel around the country, exempting only the limited stay in New Jersey. This was based on a finding that the New Jersey stay was equivalent in purpose and nature to the California stay. Here, there is no other jurisdiction where the stay is for the same purpose and nature equivalent to the stay of Appellant's property in Venice, Florida.

conflict. In any event, this does not afford a basis for this court entertaining jurisdiction.

II.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant mistakenly suggests that when a state makes an adverse factual determination in applying a tax statute, this automatically creates a Federal question.

The Florida courts were here required, purely as a matter of Florida law, to define the phrase "permanently located" contained in the taxing statute. After clarifying this phrase, the District Court in Florida then applied it to the facts of this case.

This factual determination was based on an analysis of Appellant's circus operations and its property. The courts distinguished such properties from the permanency of real estate, and found that its presence was consistent with continuity, and were not sporadically or temporarily present in the taxing jurisdiction. There is ample support in the record for such factual determination.[9]

The Florida District Court then turned to the apportionment thesis of the trial court. While recognizing the United States Supreme Court doctrine of apportionment in the taxing of instrumentalities, that court found Appellant's property to be in the nature of a commodity.[10]

The court next examined the question of whether Appellant's property was within the stream of interstate

[9](A. 1a, 20a)

[10](A. 1a)

commerce on the January 1 taxing date, and found that it was not.

Numerous U.S. Supreme Court decisions have held that taxation of property shipped interstate, either before its movement begins, *McGoldrick v. Berwind-White Coal Min. Co., supra; Coe v. Errol, supra; Bacon v. Illinois,* 227 U.S. 504, 57 L. Ed. 615; *Heisler v. Thomas Colliery Co., supra; Minnesota v. Blasius, supra;* or after such movement ends, *Brown v. Houston, supra; Pittsburg & S. Cole Co. v. Bates,* 156 U.S. 577, 39 L. Ed. 538, is not forbidden.

This court, in *McGoldrick v. Berwind-White Coal Min. Co., supra,* clarified the balance between national and state power in a footnote:

> "After its supposed recrudescence in Leisy v. Hardin, 135 U.S. 100, 34 L. Ed. 128, 10 S. Ct. 681, 3 Inters. Com. Rep. 36, the opinions of Justice Miller in Woodruff v. Parham, 8 Wall. (U.S.) 123, 19 L. Ed. 382, supra, and of Justice Bradley in Brown v. Houston, 114 U.S. 622, 29 L. Ed. 257, 5 S. Ct. 1091, were explained by Chief Justice (then Justice) White in American Steel & Wire Co. v. Speed, supra (192 U.S. at 521, 48 L. Ed. 546, 24 S. Ct. 365), as the recognition by the court that the question was not whether 'interstate commerce was to be considered as having completely terminated,' but whether a particular exertion of taxing power by a state 'so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress.' He pointed out that the Court in these cases 'conceded that the goods which were taxed had not completely lost their character as interstate commerce since they had not been sold in the original package. As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce.'"

Appellant's circus properties, including the railroad cars, were at rest in Sarasota County on the taxing date. Their journey into interstate commerce did not begin until later, when the circus was delivered to the common carrier for transport.[11] The fact that the circus property prior to coming to rest had been in interstate commerce, does not bring it within the application of the Commerce Clause for local taxing purposes.

III.

THE APPEAL REQUESTS REVIEW BY THE SUPREME COURT OF THE UNITED STATES OF QUESTIONS PREVIOUSLY ANSWERED BY THIS COURT IN MANY OTHER DECISIONS.

The due process clause (United States Constitution, Fourteenth Amendment) is not violated by the finding that Appellant's property tax situs was in Sarasota County. The opinion below sets forth the sound basis for such determination.

Appellant mistakenly fails to differentiate between instrumentality and commodity cases, preferring to label all with the title "movable property."

Instrumentality cases require apportionment. *Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18, 35 L. Ed. 613; *Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 88 L. Ed. 1283; *Braniff Airways, Inc. v.*

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[11] (A. 32a *et seq.*, departure dates for each year involved)

Nebraska, 347 U.S. 590, 98 L. Ed. 967; *Central Railroad Co. of Pennsylvania v. Commonwealth of Pennsylvania,* 370 U.S. 607, 8 L. Ed. 2d 720, *rehearing denied,* 371 U.S. 856, 9 L. Ed. 2d 93. The railroad and other instrumentality cases represent exceptions to, or limitations upon, the general right of the state to tax. Their purpose has been to avoid duplication of taxation by several states.

Commodity cases do not require apportionment. A circus, including all of its business parts, is not an instrumentality, it is a commodity, and is taxable, as are: tires—*Michelin Tire Corp. v. Wages,* 423 U.S. 276, 46 L. Ed. 2d 495, *rehearing denied,* 424 U.S. 935, 47 L. Ed. 2d 344; aviation fuel—*United Airlines v. Mahin,* 410 U.S. 623, 35 L. Ed. 2d 545; motor vehicles—*General Motors Corp. v. Washington,* 377 U.S. 436, 12 L. Ed. 2d 430; mechanical pens—*Scripto v. Carson,* 362 U.S. 207, 4 L. Ed. 2d 660; cattle—*Minnesota v. Blasius, supra;* coal—*Heisler v. Thomas Colliery Co., supra;* timber—*Coe v. Errol, supra; Diamond Match Co. v. Village of Ontonagon, supra;* and sheep—*Kelley v. Rhoads, supra.*

The commerce clause does not bar the imposition of this tax, since there is no discrimination as to interstate commerce, either as to intent or effect. Since the property is out of the stream of interstate commerce, there is no interdicted burden. Commodities may be taxed whether owned by a resident or nonresident. *Bacon v. Illinois, supra.*

It is a specious argument that the tax is a burden on interstate commerce, since every tax has some effect of that nature, but nevertheless has been held to be valid.[12]

[12] *Brown v. Houston, supra; Northwest Airlines v. Minnesota, supra; McGoldrick v. Berwind-White Coal Min. Co., supra; Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 82 L. Ed. 823, 826.

The District Court of Appeal, Second District, held that Appellant's property was not an instrumentality of interstate commerce. The facts support that finding.

Where, as here, a decision rests on an independent and adequate non-federal basis, the Supreme Court will decline to note jurisdiction.

In point is *General Motors Corp. v. Washington, supra,* where the court, in discussing the burden on the taxpayer in proving exemption from state taxation by reason of the interstate nature of its business, quoted approvingly from *Norton Co. v. Department of Revenue,* 340 U.S. 534, 537, 95 L. Ed. 517, 521, and said:

> And, as we also said in that case this burden is not met "by showing a fair difference of opinion which as an original matter might be decided differently. This corporation, by submitting itself to the taxing power . . . [of the state], likewise submitted itself to its judicial power to construe and apply its taxing statute insofar as it keeps within constitutional bounds. Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, *but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence.*" [Emphasis added.] 377 U.S. at p. 441, 12 L. Ed. 2d at p. 435.

See also: *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 53 L. Ed. 2d 965; *Wilson v. Loews, Inc.,* 355 U.S. 597, 2 L. Ed. 2d 519.

CONCLUSION

The Motion to Dismiss the appeal should be granted. Should the court act upon the jurisdictional statement as a petition for a writ of certiorari, the same should be denied.

Respectfully submitted,

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February 23, 1980

APPENDIX

IN THE
SECOND DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

Appeal No. 78-316

JOHN W. MIKOS, etc., et al.,
Appellants,

v.

RINGLING BROS.-BARNUM & BAILEY
COMBINED SHOWS, INC., etc.,
Appellee,

BRIEF OF APPELLEE

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[Page vii]

POINT ON APPEAL

I. WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT RINGLING'S TOUR AND RAILROAD PROPERTY MAY NOT BE TAXED BY SARASOTA COUNTY, AS IF IT WERE PERMANENTLY LOCATED IN SARASOTA COUNTY.

(A) Whether Ringling's Tour and Railroad Property may only be taxed on a fair, apportioned basis.

(B) Whether Sarasota County has the power to tax Ringling's Tour and Railroad Property on a fair, apportioned basis despite a lack of specific statutory authorization for apportionment.

(C) Whether this case involves the taxation of commodities or moveable property.

POINT II

WHETHER EVIDENCE RELATING TO PAYMENT OF TAXES BY RINGLING TO OTHER STATES SHOULD HAVE BEEN EXCLUDED BY THE CIRCUIT COURT.

POINTS ON CROSS-APPEAL

WHETHER RINGLING'S TOUR AND FAILROAD PROPERTY IS TAXABLE BY SARASOTA COUNTY SINCE IT WAS NOT "PERMANENTLY LOCATED" THERE ON THE ASSESSMENT DATE (RAISED BY RINGLING'S CROSS-ASSIGNMENT OF ERROR, R.1290).

IN THE
SECOND DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

Appeal No. 78-316

JOHN W. MIKOS, etc., et al.,
Appellants,

v.

RINGLING BROS.-BARNUM & BAILEY
COMBINED SHOWS, INC., etc.,
Appellee.

REPLY BRIEF OF APPELLEE ON CROSS-APPEAL

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[Page iii]

POINTS ON APPEAL

WHETHER, UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, SARASOTA COUNTY MUST REFRAIN FROM TAXING RINGLING'S TOUR AND RAILROAD PROPERTY UNLESS THE TAX IMPOSED IS IN PROPORTION TO THE OPPORTUNITIES, BENEFITS AND PROTECTION SARASOTA COUNTY CONFERRED UPON THE PROPERTY.

IN THE
SUPREME COURT OF FLORIDA

Case No. 56-661

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., etc.,
Appellant/Petitioner,

v.

JOHN W. MIKOS, etc., et al.,
Appellees/Respondents.

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[Page 6]

POINT I

RINGLING IS ENTITLED TO A DIRECT APPEAL PURSUANT TO ARTICLE V, SECTION 3 OF THE FLORIDA CONSTITUTION.

[Page 8]

A. RINGLING EXPLICITLY RAISED THE ISSUE OF THE VALIDITY OF SECTIONS 192.011 AND 192.032(2) OF THE FLORIDA STATUTES.

[Page 10]

B. THIS COURT HAS HELD THAT THE CIRCUIT COURT NEITHER PASSED ON THE VALIDITY OF SECTIONS 192.011 AND 192.032(2) NOR CONSTRUED THE CONSTITUTION.

[Page 11]

C. THE DISTRICT COURT PASSED UPON THE VALIDITY OF SECTIONS 192.011 AND 192.032(2) AND EXPRESSLY CONSTRUED THE CONSTITUTION.

[Page 16]

POINT II

THIS COURT SHOULD GRANT CERTIORARI SINCE THE DECISION OF THE DISTRICT COURT AFFECTS A CLASS OF CONSTITUTIONAL OFFICERS.

FILED
FEB 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1143

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellant,

v.

JOHN W. MIKOS, as Property Appraiser of Sarasota County, Florida, and RANDY MILLER, as Executive Director of the Department of Revenue of the State of Florida,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA IN AND FOR THE SECOND DISTRICT

APPELLANT'S REPLY MEMORANDUM

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FEBRUARY 29, 1980

INDEX

	PAGE
ARGUMENT	1
I. This Appeal Should Be Heard	1
II. Ringling Bros. Raised and Preserved the Federal Questions Below	2
III. Appellees Misconceive the Federal Questions Presented	3
CONCLUSION	5

TABLE OF AUTHORITIES

Cases

	PAGE
American Refrigerator Transit Co. v. Hall, 174 U.S. 70 (1899)	1
Central Railroad v. Pennsylvania, 370 U.S. 607 (1962)	1
Johnson Oil Refining Co. v. Oklahoma ex rel. Mitchell, 290 U.S. 158 (1933)	1
New York ex rel. New York Central & Hudson River Railroad v. Miller, 202 U.S. 584 (1906)	1
Norfolk & Western Railway v. Missouri State Tax Commission, 390 U.S. 317 (1968)	1
Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891)	1
Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905)	1
Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149 (1900)	1
Union Tank Line Co. v. Wright, 249 U.S. 275 (1919)	1

Constitutional Provisions

Constitution of the United States:
- Article I, Section 8, Clause 3 ..... *passim*
- Fourteenth Amendment, Section 1 ..... *passim*

Statutes

Florida Statutes:
- Section 192.011 (1977) ..... *passim*
- Section 192.032(2) (1977) ..... *passim*

OTHER REFERENCES

L. Carroll, *Through The Looking-Glass* (Macmillan 1966) 4

ARGUMENT

I

THIS APPEAL SHOULD BE HEARD

Appellees acknowledge that "[i]nstrumentality cases require apportionment."[1] Since the early development of the instrumentality of commerce doctrine, the archetypal instrumentality has been a railroad car employed in interstate transportation. In interpreting the Florida statutes at issue, the Trial Court below recognized this and determined that "under the Constitution of the United States the tax must be an apportioned tax . . . ." (A. 13a-14a). Indeed, until the decision on appeal here, the unwavering line of authority in this country held that railroad cars are instrumentalities of commerce.[2]

The District Court of Appeal below, however, without pausing to explain, found that Ringling Bros.' railroad cars were to be treated as commodities. Like the District Court, appellees simply declare, *ipse dixit,* that Ringling Bros.' railroad cars and the other property at issue are commodities, citing cases dealing with tires, mechanical pens, sheep and other goods traded in commerce. The logical extension of this faulty argument is that Ringling Bros.' railroad cars and the other property at issue would be taxable at full value in each of the approximately 35 other states in which the circus performs because they are "commodities" which, while present in each such state, have stepped out of the "stream of commerce."

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[1] Appellees' Motion to Dismiss, p.7.

[2] Not one United States Supreme Court case dealing with state taxation of railroad cars employed in interstate transportation has ever treated them as commodities. *See, e.g.,* Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891); American Refrigerator Transit Co. v. Hall, 174 U.S. 70 (1899); Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149 (1900); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905); New York *ex rel.* New York Central & H.R.R.R. v. Miller, 202 U.S. 584 (1906); Union Tank Line Co. v. Wright, 249 U.S. 275 (1919); Johnson Oil Ref. Co. v. Oklahoma *ex rel.* Mitchell, 290 U.S. 158 (1933); Central R.R. v. Pennsylvania, 370 U.S. 607 (1962); Norfolk & Western Ry. v. Missouri State Tax Comm'n, 390 U.S. 317 (1968).

The decision below treating Ringling Bros.' railroad cars as commodities and refusing to require apportioned taxation by a nondomiciliary state is so utterly at odds with previous unbroken authority that, if it goes uncorrected, it subverts established due process and commerce clause doctrine. No other state has treated railroad cars the way Florida has in the decision below. If Florida's radical departure from established constitutional doctrine goes unreviewed, courts and officials of other nondomiciliary states will surely feel that they too are permitted speciously to characterize property as a "commodity" solely in order to achieve a predetermined, parochial result. The ultimate effect will be multiple taxation of other companies operating in interstate commerce.

II

RINGLING BROS. RAISED AND PRESERVED THE FEDERAL QUESTIONS BELOW

Appellees acknowledge that Ringling Bros.' complaint challenges the constitutionality of the statutes at issue[3] but they assert the questions were not preserved on appeal to the District Court of Appeal because Ringling Bros. "merely sought to establish a partial exemption from taxation, by urging an apportionment formula."[4] Appellees try to obscure the fact that the apportionment argument is the embodiment of the constitutional questions in this case. From the beginning, Ringling Bros.' position has been that the due process and commerce clauses require apportionment and that if the statutes at issue are not construed so as to require apportionment, they are unconstitutional.[5]

The Jurisdictional Statement, at pages 10 and 11, shows that Ringling Bros. vigorously raised and steadfastly preserved the constitutional issues. Appellees' own appendix reinforces

[3] Appellees' Motion to Dismiss, p.2.

[4] Appellees' Motion to Dismiss, p.3.

[5] *See, e.g.,* the "Legal Issues to be Tried" section of the Stipulation for Pre-Trial Order (¶29, subpara. 2) filed by the parties in the Trial Court which sets forth the due process and commerce clause claims. (A. 26a).

this. It sets out the table of contents of Ringling Bros.' briefs on appeal to the District Court and shows that Ringling Bros. argued in Point I of its main brief that the property at issue "may only be taxed on a fair, apportioned basis" (A.A. 2a), and in its reply brief it argued that "under the due process clause of the Fourteenth Amendment to the United States Constitution . . ." apportioned taxation is required. (A.A. 4a). Similarly, Ringling Bros.' brief to the Florida Supreme Court addresses "the validity of sections 192.011 and 192.032(2) of the Florida Statutes." (A.A. 5a).[6]

Appellees overlook that the Trial Court sustained Ringling Bros.' position that in order to be constitutional these statutes had to be given a limiting construction requiring apportionment. Having obtained this construction, Ringling Bros.' main argumentative thrust, as appellee in the District Court, was to preserve that ruling. For Ringling Bros., as appellee, to have challenged statutes construed in its favor on the ground that they were unconstitutional would have been absurd. Yet appellees argue that in not doing so, Ringling Bros. failed to preserve the constitutional questions! Appellees' argument stands common sense on its head.

III

APPELLEES MISCONCEIVE THE FEDERAL QUESTIONS PRESENTED

As clearly appears from the "Questions Presented" section of the Jurisdictional Statement, the question whether the court below erred in finding that the property at issue had acquired a tax situs, *i.e.,* was "permanently located" in Sarasota County, Florida, is not raised to this Court. Thus, contrary to the apparent theme of appellees' Motion to Dismiss, the conclusion reached below concerning the meaning of the term "permanently located" is not at issue.

[6] The reference to the "Constitution" in subpoint C of Point I of Ringling Bros.' brief to the Florida Supreme Court (A.A. 5a) is to the United States Constitution.

The questions presented, however, challenge the determination below that Ringling Bros.' railroad cars and other property are commodities which have left the stream of commerce.[7] The issue is whether Florida, as a nondomiciliary state, is required by the Constitution to apportion its tax on the property at issue, or whether it may, like Humpty Dumpty in *Through The Looking-Glass,* simply declare that the property is what appellees choose to say it is and thereby avoid the dictates of the Constitution.[8]

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[7] This determination is not, as appellees assert, a finding of fact. Nor is it supported by substantial evidence. Appellees point to no facts or other evidentiary support in the record for their assertion. The treatment of Ringling Bros.' railroad and other properties as "commodities" is an ultimate legal conclusion with direct constitutional consequences and the classification itself raises constitutional questions.

[8] *See* L. Carroll, *Through The Looking-Glass* 79 (Macmillan 1966):

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

CONCLUSION

Appellees' Motion to Dismiss this appeal should be denied and the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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February 29, 1980